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Environmental Law

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I. Introduction

During 1999, significant international activity relating to environmental issues continued apace. The year began with over 130 countries adopting the Cartegena Protocol on Biosafety in January and ended with parties to the Montreal Protocol agreeing to phase out additional chemicals that destroy the stratospheric ozone layer. Considerable work was also accomplished in the United Nations Environment Programme's (UNEP) persistent organic pollutants (POPs) negotiations for a global agreement. Governments continued to work to resolve various issues that have been inhibiting ratification of the Kyoto Protocol and to

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make preparatory arrangements for the entry into force of the Rotterdam Convention on Prior Informed Consent to trade in certain hazardous chemicals. With regard to endangered species, the Convention on International Trade in Endangered Species (CITES), although not marked by significant conference activity during the year, saw increased enforcement efforts in various countries. There were also developments in marine resource conservation and pollution reduction under the auspices of the U.N. Convention on the Law of the Sea and related regimes and initiatives. At the regional level, the North American Commission for Environmental Cooperation (NACEC) continued its efforts to address environmental issues of regional concern and finalized a methodology to determine the environmental impacts of NAFTA. Significant activity occurred as well in cases brought under chapter 11 of NAFTA to protect investment expectations. This report also updates developments in environmental policies and procedures of the Overseas Private Investment Corporation (OPIC) and the World Bank, and significant developments relating to the World Trade Organization (WTO).

II. Multilateral Environmental Agreements

A. Biosafety Protocol

On January 29, 2000, over 130 countries adopted the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Protocol). The Protocol establishes international procedures applicable to the transboundary movement of bio-engineered organisms (referred to as living modified organisms or LMO).[1] The adoption of the Protocol marked the close of some four years of intensive negotiations regarding the trade of bio-engineered organisms.

1. *Advanced Informed Agreement*

To a large measure, the Advanced Informed Agreement (AIA) procedure represents the heart of the Protocol. Whether this procedure would apply solely to LMO intended for intentional introduction into the environment (e.g., seed for planting, fish for release, and microorganisms for bioremediation), or also to LMO commodities intended for food, feed, or for processing, was one of the most heavily negotiated issues. In the end, it was decided that the procedure would apply only to LMO intended for intentional introduction into the environment. It would not apply to LMO commodities, to LMO in transit or to LMO destined for contained use (e.g., vials for scientific research), which are addressed in other provisions of the Protocol, such as the documentation provisions.

The AIA procedure, in effect, requires an exporter to seek the consent of a party of import prior to the first shipment of an LMO intended for intentional introduction into the environment of the party of import. The party of import must then decide whether and on what conditions to permit the import. The party of import must make its decision based on a scientific risk assessment and within 270 days of its receipt of the exporter's notification, although the party of import may extend this timeframe.

The Protocol requires governments to provide an Internet-based Biosafety Clearing-House with information concerning any final decisions that it has made on the domestic

1. The Protocol contains a general exclusion for pharmaceuticals, which states: "this Protocol shall not apply to the transboundary movement of living modified organisms which are pharmaceuticals for humans that are addressed by other relevant international agreements or organizations."

use of an LMO commodity within fifteen days of making that decision. A developing country party or a party with an economy in transition that does not have its own domestic regulatory framework may indicate through the Biosafety Clearing-House that it intends to take a decision on such an LMO based on a scientific risk assessment within 270 days.

2. *Documentation*

Documentation of LMO shipments was the final issue negotiated. The Protocol sets forth different shipping documentation requirements for different types of LMO.

Documentation accompanying shipments of LMO intended for intentional introduction into the environment (e.g., seeds for planting, fish for release) must identify the shipment as containing LMO and state the identity and relevant traits of the LMO. The documentation must specify a contact point for further information, and any safety requirements, and include, as appropriate, the name and address of the exporter and importer. It must also contain a declaration that the movement is in conformity with the requirements of the Protocol applicable to exporters.

Documentation accompanying shipments of LMO commodities must indicate that the shipment "may contain" LMO, that the shipment is not intended for intentional introduction into the environment, and specify a contact point for further information. The Protocol provides for a decision by the parties to further elaborate on detailed requirements for this purpose, including specification of the identity and any unique identification of the LMO, no later than two years after the entry into force of the Protocol.

Documentation accompanying shipments of LMO destined for contained use (e.g., for scientific or commercial research) must identify the shipment as containing LMO. It must also specify a contact point for further information, including the name and address of the consignee, and any safety requirements.

3. *Confidentiality*

The Protocol provides for the protection of confidential information received under the Protocol.

4. *Relationship between the Protocol and Other International Agreements (the "Savings Clause")*

The Protocol contains in its preamble a savings clause, which expressly states the parties' intention that the Protocol not alter existing rights and obligations, including those under the WTO agreements. The clause states "this Protocol shall not be interpreted as implying a change in the rights and obligations of a party under any existing international agreement."

Two political statements accompany the clause. The first recognizes "that trade and environment agreements should be mutually supportive with a view to achieving sustainable development." The second states that the savings clause "is not intended to subordinate this Protocol to other international agreements."

5. *Precaution*

The Protocol includes language that states:

> Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the party of import, taking also into account the risks to human health, shall not prevent that party from taking a decision, as appropriate, with regard to the import of the living modified organisms in question . . . in order to avoid or minimize such potential adverse effects.

6. *Trade with Non-Parties*

The United States is not a party to the Convention on Biological Diversity and therefore cannot currently become a party to the Protocol. The Protocol states that the "transboundary movement of living modified organisms between Parties and non-Parties shall be consistent with the objective of this Protocol."

7. *Preview for 2000*

The Protocol will be open for signature in Nairobi from May 15–26, 2000, and at the United Nations Headquarters in New York from June 5, 2000 to June 4, 2001. The Protocol will enter into force after it is ratified by fifty parties to the Convention on Biological Diversity. The full text of the Protocol is available at the Convention on Biological Diversity web site, <http://www.biodiv.org/biosafe/>. Key elements of the Protocol are described below.

B. Convention on International Trade in Endangered Species

The Convention on International Trade in Endangered Species (CITES) prohibits commercial trade in species that could be threatened if trade were uncontrolled.[2] Protected species are listed in appendices to the Convention. The United States implements CITES through provisions of the Endangered Species Act.[3]

1. *Developments in 1999*

The year 1999 was not a conference year for CITES. (The 11th Conference of the Parties will be held in April 2000 in Kenya.) The year was marked by modest activity, including the addition of parties, the announcement of a new secretary general, and with each of the key committees of CITES holding a meeting. In addition, the year witnessed significant enforcement efforts in several countries.[4]

The CITES Secretariat reported that Azerbaijan and Grenada became the 145th and 146th parties to CITES. Iceland submitted necessary materials to qualify as a voting member by the 11th Conference of the Parties in 2000.

Willem Wijnstekers became CITES secretary general effective April 1999. He was previously with the European Commission and has extensive experience in the CITES arena. Under his leadership, one significant change that has already occurred is the open availability of treaty documents. The secretariat has taken advantage of the Internet as a method of communication with the public. Documents previously difficult to obtain even for those knowledgeable about the process are now available to everyone with access to the Internet at <http://www.wcmc.org.uk/CITES>.

At a February 1999 meeting of the Standing Committee of CITES, the committee made a finding, based upon a resolution from the 10th Conference of the Parties, to allow the state-to-state transfer of ivory. During the summer of 1999, ivory transfer occurred without

2. Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora, 12 I.L.M. 1088 (1973).

3. Endangered Species Act, 16 U.S.C.A. § 1538 (1999).

4. Also, in November 1999, CITES signed an agreement with TRAFFIC International that designates regional TRAFFIC offices as "CITES Capacity Building Collaboration Centers." This agreement should result in more local training and workshops on CITES issues.

incident, with shipments from the government storehouses of Zimbabwe, Botswana, and Namibia to Japan. The amount of money realized from the sale, though not disclosed officially, is thought to be in the area of $5 million.

Also at the 41st Standing Committee meeting, the parties decided that Greece had made sufficient progress in adopting national legislation to justify the withdrawal of the trade suspension recommendation previously made by the Standing Committee. On the same topic, but with a contrary result, the 42nd Standing Committee meeting in Lisbon voted to recommend that the parties suspend wildlife trade with Guyana and Senegal because they have not adopted domestic legislation to implement CITES.[5]

On the enforcement front, the illegal trade route from India into Nepal continued to be the site of considerable activity in 1999. One arrest resulted in the confiscation of fifty leopard, three tiger, and five fox skins. The pelts were unmarked with bullet holes, and it appeared that most of the animals had been killed only a month or so before. In April, eighty-four kilograms of tiger bones were seized in Dharchula in Uttar Pradesh. Also during 1999, Japan, by regulation, extended domestic legal control of tiger parts to include tiger bone, which will be effective in 2000.

Elephant ivory also continued to be a mainstay of illegal smuggling. During 1999, 150 tusks were seized in Lisbon, 1,845 kilograms of ivory were impounded at Dubai's airport, and Russian custom officials discovered 537 kilograms of ivory in the baggage of the wife of a North Korean diplomat.

In the United States, the first successful prosecution for illegal trade of coral resulted in an eighteen-month prison sentence. Another prosecution for illegal importation reached the U.S. Court of Appeals for the Eleventh Circuit.[6] The court upheld a conviction for smuggling into the United States fourteen red-tail boa constrictors (as a fund raising source for a Peruvian Christian mission).

In Hong Kong, a woman received a three-month suspended sentence and a $39,000 fine for possession of, and offering for sale, 130 shahtoosh shawls made from the fur of Tibetan antelope, which she had purchased in India and imported into Hong Kong. It is generally understood that it takes the fur from three Tibetan antelopes to make one shawl. Also, in April 1999, Chinese police arrested forty-two poachers in the Hol Xil Nature Reserve, confiscating 1,000 Tibetan antelope furs, 300 antelope heads, four wild yak furs, twenty-six pieces of donkey hide, and a number of bear's paws.

A disturbing report issued in 1999 by the Environment Ministry of Columbia (obtained by Reuters) stated that about seven million reptiles, multi-colored birds, frogs, monkeys, spiders, and other species are smuggled out of Colombia yearly. The black market value of these animals is approximately $40 million. Upwards of eighty percent of these animals die during transport.

2. *Preview for 2000*

The 11th Conference of the Parties will be held April 10–20, 2000, in Nairobi, Kenya, where whales and elephants will remain on center stage. The International Whaling Commission in 1999 did not set quotas for the commercial killing of whales. Nevertheless, Japan is expected to seek the downlisting of a number of whale species at the CITES meeting. The United States has announced its opposition to the downlisting of whales. The parties

5. *See* CITES Notification No. 1999/65 (September 30, 1999).
6. United States v. Eaton, 179 F.3d 1328 (11th Cir. 1999).

have submitted approximately twenty-four resolutions for consideration.[7] Conflicts among parties concerning the wisdom of using highly endangered species for commercial gain remains unresolved and will be critical for a number of issues, including turtles, whales, and elephants at the conference.

C. Kyoto Protocol

The U.N. Framework Convention on Climate Change (Climate Change Convention),[8] which opened for signature at the 1992 Rio Earth Summit and entered into force on March 21, 1994,[9] is a multilateral treaty setting forth a comprehensive framework for addressing global warming. The chief commitment of the parties to the Convention is to stabilize greenhouse gas (GHG)[10] concentrations to prevent "dangerous anthropogenic interference" with the world's climate system.[11] To achieve stabilization, the developed parties to the Convention agreed to adopt voluntary measures and policies to reduce their GHG emissions to 1990 levels by the year 2000.[12]

In 1997, largely because these voluntary policies and measures had failed to stabilize GHG concentrations,[13] the Conference of the Parties concluded a Protocol to the Convention, known as the "Kyoto Protocol," after the location of the meeting. The Protocol established binding obligations for developed countries to reduce GHGs below 1990 levels,[14] to be achieved during a compliance period that runs from 2008–2012. The Kyoto Protocol allows parties to reach those reductions through several emissions-offsetting and trading mechanisms (Kyoto Mechanisms)[15] and by taking into account passive GHG uptake activities (i.e., carbon sequestration) through carbon sinks, such as forests.[16] The Kyoto

7. Resolutions on this topic and the listing proposals as well as other CITES materials are available at <http://www.wcmc.org.uk/CITES>.

8. U.N. Framework Convention on Climate Change, Mar. 21, 1994, 31 I.L.M. 849, *available at* <http://www.unfccc.de/resource/conkp.html>.

9. More than 180 parties, including the United States, have ratified the treaty.

10. Annex B of the Kyoto Protocol lists the following GHGs: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O); hydrofluorocarbons (HFCs); perfluorocarbons (PFCs); and sulphur hexafluoride (SF_6). The most significant greenhouse gas is CO_2, a byproduct of fossil-fuel combustion.

11. Climate Change Convention, *supra* note 8, art. 2. *See* Thomas Richichi, *Although Storm Clouds Threatened Throughout the Global Warming Conference in Kyoto, the Conferees Reached an Agreement on Greenhouse Gas Emissions*, Nat'l L. J. (Dec.1997-Jan. 1998).

12. Climate Change Convention, *supra* note 8, art. 4(2)(b).

13. The Kyoto Protocol is available at <http://www.unfccc.de/resource/conkp.html>. Prior to adoption of the Protocol, the parties adopted the 1995 "Berlin Mandate" in which they agreed to commit to binding emissions reduction targets for developed countries by 1997. The Kyoto Protocol, adopted at the Third Convention of the Parties in Kyoto, Japan, is one of the core results of that mandate. For a discussion of the events leading up to adoption of the Kyoto Protocol, see Richichi, *supra* note 11, and Annie Petsonk, *Multilateral Environmental Agreements, The Kyoto Protocol on Climate Change*, 32 Int'l L. 516, 516–519 (1998).

14. Actual percent reductions are assigned to each country. The U.S. emissions reductions are 7% below 1990 emissions levels. *See* Kyoto Protocol, art. 3 and Annex B.

15. The Kyoto Mechanisms include the global emissions trading system for all parties to the Convention, joint implementation (JI) of emissions reduction projects between developed countries and the Clean Development Mechanisms (CDM), which would allow industrialized nations to achieve emissions credits through projects in developing countries. *See* Kyoto Protocol, arts. 6 (JI), 12 (CDM), and 17 (emissions trading). The World Bank recently launched a prototype Carbon Fund to support implementation of the CDM by creating a private investment fund to invest in energy-efficient projects in developing countries in return for emissions reductions. *See generally* <http://www.prototypecarbonfund.org>.

16. Kyoto Protocol, art. 3.

Protocol will enter into force when at least fifty-five percent of the parties, including parties accounting for at least fifty-five percent of developed countries' emissions, have ratified the instrument.[17] By the end of 1999, only eighteen parties, all of them developing countries, had ratified the Kyoto Protocol.[18]

1. *Developments in 1999*

Throughout 1999, the primary objective of the Convention parties has been to resolve a number of significant issues that have presented obstacles to ratification of the Kyoto Protocol by developed countries. As discussed below, these include: implementation of the Kyoto Mechanisms; enforcement procedures; developing country participation; and the scope of carbon sequestration activities. This effort is likely to continue through 2000. The most significant development from the Fifth Convention of the Parties (COP)[19] was a pledge by the parties to resolve the remaining Kyoto issues by COP 6.[20] Hopefully, the deadline will trigger ratification and entry into force of the Kyoto Protocol as early as possible.[21] The primary outstanding issues include:

- *Kyoto Mechanisms*. Perhaps the most contentious issue involves the Kyoto Mechanisms and whether to allow caps on emissions trading.[22] The U.S. position, backed by members of an "umbrella group" that includes Japan, Canada, and New Zealand (JUSCANNZ), is that emissions trading must be unlimited to ensure cost-effective, market-based implementation of the Kyoto Protocol. The JUSCANNZ position conflicts with that of the European Union and other nations, which believe that emissions caps must be imposed to ensure implementation of carbon reduction projects in industrialized nations. In addition to the issue of emissions caps, a number of significant technical issues relating to implementation of a global emissions trading regime remain, including how to conduct emissions monitoring, calculation, verification, and accreditation. Consensus on these implementation issues will likely be imperative to creation of a workable and credible emissions trading system.[23]
- *Compliance Mechanisms*. The parties continue to negotiate the details of compliance procedures and enforcement mechanisms under the Protocol, although they appear to have reached general consensus on the function and procedures of a compliance re-

17. Kyoto Protocol, art. 25.

18. These developing countries are: Antigua and Barbuda, the Bahamas, Cyprus, El Salvador, Fiji, Georgia, Guatemala, Jamaica, Maldives, Micronesia, Nicaragua, Niue, Panama, Paraguay, Trinidad and Tobago, Turkmenistan, Tuvalu, and Uzbekistan.

19. COP 5 was held in Bonn, Germany from October 25 to November 5, 1999.

20. *Implementation of the Buenos Aires Plan of Action*, Decision 1/CP.5 (Nov. 4, 1999). COP 6 will be held in The Hague, Netherlands in November 2000.

21. *Id.*

22. *See generally Mechanisms Pursuant to Articles 6, 12 and 17 of the Kyoto Protocol, Synthesis of Proposals by Parties on Principles, Modalities, Rules and Guidelines*, FCCC/SB/1999/8 (Sept. 28, 1999).

23. However, Under Secretary of State Frank E. Loy noted in closing remarks at COP 5 that the broad outlines of an effective international emissions trading system have begun to take shape, pointing out that essential agreement was reached on: strong systems for monitoring and reporting emissions; a common unit for emissions trading; an airtight global accounting system; full private sector participation and a strong, effective system to ensure compliance. Frank E. Loy, Under Secretary of State for Global Affairs, *Closing Statement at Fifth Session of the Conference of the Parties to the Framework Convention on Climate Change* (Nov. 4, 1999), *available at* <http://www.state.gov/www/policy_remarks/1999/991104_loy_climate.html>.

gime.[24] In addition, the parties agreed that, structurally, there should be an initial facilitative advice and assistance phase for those countries experiencing difficulty in complying with their commitments, an opportunity to cure, and then a formal determination of non-compliance with binding consequences. Outstanding issues relate to the types of enforcement measures that may be imposed (e.g., limitations on participation in emissions trading mechanisms, monetary sanctions), procedures for initiating compliance actions, and the role of the COP in resolving compliance cases.

- *Developing Countries.* Another key issue, especially significant to the United States, is the participation of developing countries in the Kyoto Protocol. The U.S. Senate, through the Byrd Resolution, has noted its opposition to ratification of the Kyoto Protocol absent developing country reduction targets.[25] Although the Protocol does not currently impose any emissions reductions targets for developing nations, at COP 5, the parties committed to identifying developing country capacity and technology needs, and called for a draft framework text for capacity-building activities for developing countries.[26] It is hoped that the capacity-building will spur additional commitments by developing countries to implement the Kyoto Protocol and adopt emissions reductions targets.[27] Notably, at COP 5, Argentina became the first developing country to announce self-imposed emissions reductions targets.
- *Carbon Sequestration.* Finally, a remaining core issue under the Kyoto Protocol is selection and measurement of carbon sequestration activities through carbon sinks. Most of the key issues that have been identified by the parties deal with the verifiability and transparency of calculating carbon stocks, both of which depend heavily on unresolved technical issues associated with data collection and identifying types of candidate carbon sinks. During COP 5, the Intergovernmental Panel on Climate Change (IPCC)[28] presented a Special Report on land-use, land-use change, and forestry to assist the parties in their decision-making regarding definitions, an accounting system, monitoring and reporting system, and inventory guidelines. The IPCC plans to issue a final report on carbon sequestration issues in May 2000.[29] Given the abundance of U.S. forestlands

24. *See Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol Elements of Compliance Systems and Synthesis of Submissions*, FCCC/SB/1999/7 (Sept. 17, 1999).

25. S. Res. 98, 105th Cong. (1997). The U.S. Senate passed the "Byrd Resolution" by a 95–0 vote on July 25, 1997, prior to the adoption of the Kyoto Protocol. The resolution states that the United States should not be a signatory to any climate change agreement that requires industrialized nations to reduce GHG emissions unless developing countries also have emissions reductions commitments. The resolution also states that an economic analysis of the impacts of the protocol should be conducted prior to ratification.

26. *See Capacity-Building in Developing Countries*, Decision 10/CP.5 (Nov. 4, 1999).

27. This includes China, which in the future is expected to surpass the United States as the largest source of carbon dioxide emissions. *See* Richichi, *supra* note 11.

28. The World Meteorological Organization (WMO) and UNEP established the IPCC in 1988 to assess scientific, technical, and socioeconomic information regarding human-induced climate change. The assessments are drawn primarily from published and peer reviewed scientific and technical literature. The work of the IPCC has played a critical component in the climate change debate. In its Second Assessment Report in 1995, the IPCC concluded that, "the balance of evidence suggests that there is a discernible human influence on global climate change." IPCC, IPCC Second Assessment 22 (1995). The Third Assessment Report was under preparation at the time of writing.

29. *See* Robert T. Watson, *Report to the Fifth Conference of the Parties of the United Nations Framework Convention on Climate Change* (Nov. 2, 1999), *available at* <http://www.ipcc.ch/press/speech11-99.htm>. The IPCC also presented reports on aviation and the global atmosphere, technology transfer, and future emissions scenarios.

and agricultural activities, U.S. negotiators may seek broad interpretation of the carbon sequestration provisions.[30]

Despite the significant issues regarding implementation of the Kyoto Protocol, 1999 has also seen a growing commitment to reduction of GHGs by parties at the domestic level. Perhaps most significantly, the strong initial political resistance of the United States appears to be diminishing somewhat.[31] U.S. Under Secretary of State Frank Loy indicated that headway at COP 5 was made on the two key issues upon which U.S. ratification will hinge: (1) meaningful participation by developing nations and (2) cost-effective implementation.[32] In addition, U.S. states have begun to undertake GHG reduction initiatives.[33] While party domestic initiatives do not guarantee that a ratifiable Protocol will be developed by COP 6, they may signal increased public and private willingness to commit to controls of anthropogenic sources of GHGs in the United States and abroad.[34]

D. Montreal Protocol

As 1999 drew to a close, it witnessed further progress in the implementation of the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) in various areas. Under the 1987 Montreal Protocol, governments agreed to phase out chemicals that destroy stratospheric ozone, which is essential for shielding humans, plants, and animals from the damaging effects of ultra-violet light. Recent years have witnessed record thinning of the ozone layer including the ozone "hole" over Antarctica. Scientists predict that the ozone layer will start to recover in the near future and will fully recover by the middle of the twenty-first century, but only if vigorous enforcement of the Montreal Protocol continues.

Under the Montreal Protocol, developing countries are to freeze their chlorofluorocarbons (CFC) and halons emissions at average 1995–1997 levels during the twelve-month

30. *See Methodological Issues, Land-Use, Land-Use Change and Forestry, Submissions from Parties*, FCCC/SBSTA/1999/MISC.7 (Sept. 14, 1999).

31. For example, several major U.S. companies, including Dow Chemical, Shell Oil, Ford, DaimlerChrysler, Texaco, and Southern Company, have recently withdrawn from a business consortium that has historically opposed ratification of the Kyoto Protocol.

32. *See* Loy, *supra* note 23.

33. For example, the state of Oregon, through its Department of Energy (ODOE), issued final rules establishing carbon dioxide emissions standards for several types of energy utilities. The rules implement statutory provisions setting carbon dioxide emissions limits for new energy facilities passed by the Oregon Legislature in 1997. Oregon is the first state in the United States to regulate carbon dioxide as a pollutant, notwithstanding that at the federal level, there remains significant debate about the legal authority of the Environmental Protection Agency (EPA) to regulate carbon dioxide as a pollutant. *See* <http://www.energy.state.or.us/climate/ccnewst.pdf>. The state of New Jersey proposed rules that include GHG credits under its Open Market Emissions Trading (OMET) program and would allow GHGs to be banked, transferred, and retired. *See* <http://www.state.nj.us/dep/aqm/ometp2pr.pdf>. New Jersey is the first state in the United States to propose a trading system for GHG credits.

34. For example, EU countries have also moved forward with climate change related initiatives. France recently unveiled its national climate change action plan that includes more than 100 new measures to reach its goals, including new taxes on energy and fuel, emissions standards for agriculture, transport and waste sectors, and a possible trading mechanism. *See* Lawrence J. Speer, *Country Finalizing Climate Change Action Plan that Includes Energy Tax*, 23 BNA Int'l Env't Rep., Jan. 19, 2000, at 49–50. The United Kingdom has implemented a climate change tax beginning April 2000. *See Ten-Energy-Intensive Industries Agree to Cuts for Discount on Climate Change Levy*, 23 BNA Int'l Env't Rep., Jan. 5, 2000, at 14.

period that began on July 1, 1999. They must then cut back rapidly to fifty percent by the year 2005 and fully phase out by 2010. Developed countries phased out the use of these chemicals almost completely in 1996, although some countries with economies in transition have experienced delays in meeting their deadlines.

1. *Developments in 1999*

At the 11th Meeting of the Parties to the Montreal Protocol, held in Beijing, China, from November 29 to December 3, 1999, the parties took several additional steps toward realizing the Protocol's goals. First, the parties adopted some adjustments to the Montreal Protocol[35] relating to control and gradual phase-out of production by developed countries of CFC, halons, other fully halogenated CFCs, and methyl bromide for basic domestic needs of developing countries.

Second, the parties amended the Montreal Protocol[36] by adopting new controls on the production of hydrofluorocarbons (HCFC). HCFCs were developed as the first major replacement for CFCs, but while much less destructive than CFCs, they also contribute to ozone depletion. Under the Protocol, developed countries are to phase out HCFCs by 2030 and developing countries by 2040. The Beijing Amendment to the Protocol will also ban trade in HCFCs with countries that have not yet ratified the Copenhagen Amendment (1992),[37] which introduced the HCFC phase-out. This will provide an incentive to these countries to ratify as soon as possible.

The Beijing Amendment also requires developed countries to freeze the production of HCFCs in 2004 at 1989 levels (measured as the average of consumption and production levels) and developing countries to do so in 2016 with a similar baseline of 2015. Production of fifteen percent above baseline will be permitted to meet the "basic domestic needs" of developing countries. In addition, the production of a recently developed ozone-depleting chemical, bromochloromethane, is to be completely phased out in all countries by January 1, 2002.

Third, the Beijing meeting addressed a growing concern that the chemical industry will create and market new ozone-depleting chemicals in the future. The parties requested the Scientific Assessment Panel and the Economic Assessment Panel to develop criteria for assessing the ozone-depletion potential of any new chemicals and to explore mechanisms for facilitating cooperation with the private sector on such assessments.

Fourth, the Parties agreed on a multimillion-dollar funding package that will enable developing countries to maintain the momentum of their efforts to phase out CFCs and other ozone-depleting chemicals as required under the Montreal Protocol. The funds are used to support the adoption of more ozone-friendly technologies for refrigerators, air conditioners, and other consumer products and industrial processes. The agreed funding includes $440 million in new contributions, plus $35,700,000 carried over from the previous period, for a total budget of $475,700,000 for the three-year period 2000–2002. This con-

35. The Beijing Adjustments to the Montreal Protocol were formally communicated to all Parties to the Montreal Protocol by the U.N. Secretary-General in his capacity as Depositary of the Protocol on January 28, 2000. It will enter into force six months from the date of the notification.

36. The Beijing Amendment to the Montreal Protocol shall enter into force on January 1, 2001, provided that at least 20 instruments of ratification of the amendment have been deposited. In the event that this condition is not fulfilled, it shall enter into force on the 90th day following the date of which it is fulfilled.

37. Entered into force on June 14, 1994.

stitutes the fourth replenishment of the Protocol's Multilateral Fund. Since 1991, some $1 billion has been spent by the Fund to reduce the production and use of CFCs and other harmful substances in over 110 developing countries.

The Beijing meeting concluded with the adoption of the Beijing Declaration, reaffirming the political commitment by the world's governments to accelerate the phase-out of substances that destroy the stratosphere's protective ozone layer. The Declaration also appeals for continued efforts to address illegal trade in ozone-depleting substances.

2. *Preview for 2000*

In 2000, the parties to the Montreal Protocol will consider a few issues arising from their previous decisions in 1998 and 1999. The Technology and Economic Assessment Panel (TEAP) will report to the parties on the emissions of carbon tetrachloride and other ozone-depleting substances used as feedstock, the impact of CFC production phase-out on the future use of carbon tetrachloride as feedstock, and emissions from future use. Also, the parties will consider reports of the TEAP and the Scientific Assessment Panel, as appropriate, regarding: (a) whether substances such as n-propyl bromide, with a very short atmospheric life-time of less than one month, pose a threat to the ozone layer; (b) the sources and availability of halon-1202; and (c) new substances of which the panels are aware, either as a result of information provided by parties, or otherwise, which are estimated to have a significant ozone-depleting potential.

The 12th Meeting of the Parties to the Montreal Protocol will be held in Ouagadougou, Burkina from December 11–15, 2000.

E. Rotterdam Convention on Prior Informed Consent

The Rotterdam Convention on Prior Informed Consent (PIC) Procedure (Rotterdam Convention)[38] marks another step in the development of an international body of "right-to-know" law. The Rotterdam Convention provides for notice to the government of an importing country about imports of chemicals regulated by the exporting government. Its purpose is to provide governments with the information necessary to make decisions about future imports. The Rotterdam Convention will enter into force following ratification by fifty countries.

The Rotterdam Convention builds on a voluntary PIC procedure embodied in guidelines developed by the United Nations Environment Programme (UNEP) and the United Nations Food and Agriculture Organization (FAO).[39] By 1999, 155 countries had named 227 Designated National Authorities (DNA) to receive PIC information on listed pesticides and industrial chemicals under the voluntary program. Pending the entry into force of the Rotterdam Convention, the Convention signatories decided to continue the voluntary PIC program, modified to account for the treaty provisions. The program is now known as the "interim PIC procedure." Notably, only half of the countries participating in the voluntary PIC program have elected to sign the Rotterdam Convention.

38. The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, *opened for signature* Sept. 10, 1998, U.N. Doc. UNEP/CHEMICALS/98/17 [hereinafter Rotterdam Convention].

39. UNEP London Guidelines on the Exchange of Information on Chemicals in International Trade (1987); FAO Code of Conduct for the Distribution and Use of Pesticides (1985).

1. *Developments in 1999*

Little activity regarding the Rotterdam Convention occurred during 1999. Of the seventy-three countries that have signed the Rotterdam Convention, only El Salvador and Slovenia have ratified it. The United States has signed the Convention, but progress toward U.S. ratification may well be delayed beyond the year 2000. As of the date of this writing, the Clinton administration had not yet submitted the Rotterdam Convention for the advice and consent of the Senate, nor had implementing legislation been proposed. [Editor's note: the Clinton administration submitted the Rotterdam Convention for advice and consent on February 9, 2000.] At a minimum, implementation of the Rotterdam Convention in the United States will require changes to the import and export provisions of the Toxic Substances Control Act (TSCA).

The Intergovernmental Committee that negotiated the Rotterdam Convention was appointed to manage the operation of the interim PIC procedure, including whether to include additional chemicals in the procedure.[40] The committee established the Interim Chemical Review Committee (ICRC) to review nominations of chemicals for the PIC list. The ICRC's first meeting will be held February 25–29, 2000, in Geneva. Although no new chemicals are slated for addition to the PIC list, the ICRC will consider the addition of four chemicals that had been nominated for the voluntary program but not included as of the date of the Rotterdam Convention. The ICRC will be converted to the Chemical Review Committee as of the date the Rotterdam Convention enters into force.

2. *2000 and Beyond*

The existing voluntary PIC program may explain the slow pace of signature and ratification of the Rotterdam Convention. Signatories to the Rotterdam Convention are in effect meeting their obligations without establishing additional national implementing measures.[41] For example, the chemical nominations, notifications of national regulatory actions, and information exchange systems under the Rotterdam Convention would continue to operate much as they had under the voluntary program. The future of the Rotterdam Convention as a viable rule of international law may well depend on the extent to which the signatories believe the Convention offers significant advantages over the voluntary program.

F. UNEP Persistent Organic Pollutants Negotiations

The negotiations for a new international legally binding instrument to reduce or eliminate releases of persistent organic pollutants (POP) into the environment continued during 1999 and should be concluded during 2000. In its decision 19/13C of February 7, 1997, the Governing Council of UNEP requested that the executive director convene an intergovernmental negotiating committee (INC) with a mandate to prepare an international legally binding instrument for implementing action on twelve specified POPs (aldrin, chlordane, dieldrin, DDT, endrin, heptachlor, hexachlorobenzene, mirex, toxaphene, PCBs, di-

40. The next meeting of the PIC Intergovernmental Negotiating Committee is tentatively scheduled for September 2000, in Geneva, Switzerland.

41. Strictly speaking, the parties have obligated themselves to take appropriate national implementing measures under the Rotterdam Convention. *See* Rotterdam Convention, art. 15. The obligation will only become effective, of course, upon entry into force.

oxins, and furans).[42] The INC was also requested, at its first session, to establish an expert group for the development of science-based criteria and a procedure for identifying additional candidates for future international action.[43]

During the first session of the INC, held June 29 to July 3, 1998, and chaired by Dr. John Buccini of Canada, the committee made several crucial substantive decisions, including: (1) the establishment of a subsidiary body, the Criteria Expert Group (CEG), to work intersessionally for the purpose of developing science-based criteria and a procedure for identifying additional POPs as candidates for future international action; (2) an agreement to form another subsidiary body, the Implementation Aspects Group (IAG), to consider possible requirements to include in the future convention on such matters as technical assistance and financial resources and mechanisms; and (3) general agreement on an outline of possible articles for the convention.

The first session of the CEG, co-chaired by Dr. Fatoumata Jallow-Ndoye of Gambia and Dr. Reiner Arndt of Germany, was held later in 1998. That session developed draft science-based criteria for future discussions and also requested the secretariat to outline a potential process, based on considerations submitted by the CEG, for adding chemicals to the future convention.

1. *Developments in 1999*

The second session of the INC was held January 25–29, 1999, at UNEP headquarters in Nairobi. During the session, the IAG began its work with Dr. Maria Cristina Cardenas Fischer of Colombia as chair. It explored potential implementation needs for the future

42. The UNEP mandate also included a number of immediate actions recommended by the IFCS. These were mainly directed toward making an early start on reducing and/or eliminating POP releases, rather than waiting for the Convention to take effect.

43. This mandate followed a number of international stages to ensure that there was a sound scientific and policy basis for the negotiations, including:

- Decision 18/31 adopted by the Governing Council of UNEP in 1995, addressing POPs in the Protection of the Marine Environment from Land-Based Activities and the related draft Global Programme of Action;
- Decision 18/32 adopted by the UNEP Governing Council in 1995, inviting the Inter-Organization Programme for the Sound Management of Chemicals (IOMC, a collaborative effort of UNEP, WHO, FAO, ILO, UNIDO, UNITAR, and OECD) to coordinate activities related to the sound management of chemicals), and the International Programme on Chemical Safety (a joint programme of UNEP, WHO, and ILO), and the IFCS to initiate an assessment process on the need for international action. The IFCS was requested to develop recommendations for consideration by the UNEP Governing Council and World Health Assembly in 1997;
- a strong commitment to move against POPs was included in a declaration reached in 1995 by the Washington Conference to adopt the Global Programme of Action for Protection of the Marine Environment from Land-based Activities; and
- after expert meetings in Manila, the Philippines in June 1996, IFCS recommended international action, including an international legally binding instrument, to the UNEP Governing Council and World Health Assembly.

In addition to these activities directly related to UNEP's mandate, a number of other key activities on POPs were also taking place, including:

- negotiations initiated in 1995 on a POPs protocol by the Executive Body for the Convention on Long-range Transboundary Air Pollution (LRTAP) under the U.N. Economic Commission for Europe, with the final protocol adopted in June 1998; and
- a resolution to reduce persistent, bioaccumulative, toxic pollutants to the marine environment by the year 2005 was agreed to in June 1995 by the parties to the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution.

convention and how they might be framed as substantive provisions. The plenary, on the basis of a paper requested from the secretariat, began the work of discussing and negotiating textual provisions of the future treaty.

The second session of the CEG was held June 14–18, 1999, in Vienna. That session completed the development of science-based criteria and a process for identifying additional POPs. Significantly, the group concluded its work in two sessions instead of the three sessions anticipated. Its work was marked by a high degree of consensus, although it did identify certain items that it thought might best be addressed by the INC.

The third session of the INC was held September 6–11, 1999, in Geneva. That session made significant progress in drafting the future convention. There was agreement to use the results of the CEG as the basis for provisions to add POPs to the future convention. The IAG continued its work, with expectations of an early conclusion at the fourth session of the INC. The plenary discussed other substantive articles in depth, and further refined provisions, often with the assistance of contact groups. A Legal Drafting Group also was established, chaired by Patrick Szell of the United Kingdom.

2. *Future Sessions and Outstanding Issues*

The fourth session of the INC will be held March 20–25, 2000, in Bonn. The fifth session of the INC is planned for South Africa in late 2000, but the exact dates and venue have not been determined. The Conference of the Plenipotentiaries for the adoption and signature of the convention is scheduled for May 21–23, 2000, in Stockholm.[44]

During future sessions, the INC will address the following outstanding issues:

- **Technical assistance and financial resources and mechanisms.** There is clear recognition that technical assistance and financial mechanisms will be required under the future treaty, but the extent and modalities still need to be worked out. The IAG has made excellent progress to date, although negotiations on financial matters are frequently somewhat difficult and tense. The exact nature of these provisions will depend heavily on the substantive provisions for the twelve POPs, as well as expectations concerning possible requirements for additional POPs. Consequently, there is a need, acknowledged by the INC, to elaborate on these provisions simultaneously with the technical/substantive provisions. The fourth session of the INC will begin full discussions of these provisions in plenary.
- **Exact measures for the twelve POPs.** Extensive work has been done in crafting measures for intentionally produced POPs, with a general agreement to target these POPs for production/use elimination, coupled with specific exemptions. Concerning by-product POPs, there was general agreement to use an approach calling for the development and subsequent implementation of national action plans.
- **The details.** As with any consensus product, the devil is often in the details. As an expedient, negotiators generally set off alternative texts or options in brackets, leaving them for later resolution. Consequently, later negotiating sessions are often a process of working through the brackets trying to resolve approaches into an agreement. The

44. The UNEP Chemicals secretariat maintains a web site at <http://www.chem.unep.ch/pops/>. Meeting documents and other information on POPs can be obtained from the web site, or by contacting UNEP at chemicals@unep.ch.

POP negotiations are no exception to this, and much of the future work of the INC will be dedicated to working out the details.

III. Regional and Multilateral Fora

A. North American Free Trade Agreement & North American Agreement on Environmental Cooperation

The potential impact of the North American Free Trade Agreement (NAFTA) on sustainable use of environmental resources in North America remains a topic of debate and interest to a wide range of stakeholders. While the focus of NAFTA is facilitation of open trade among the NAFTA parties, NAFTA also includes a variety of rights, obligations, and principles to promote sustainable use of environmental resources. An attempt was made to balance the goal of freer trade and sound environmental management and use of natural resources. The North American Agreement on Environmental Cooperation (the NAAEC or "Environmental Side Agreement") reflects an additional effort to address environmental concerns. Nonetheless, concerns remain that NAFTA may encourage environmentally harmful practices.

After discussing developments under the NAAEC in 1999, this section addresses one chapter of the NAFTA, chapter 11 on investment, which has drawn particular attention because it provides for a private right of action against NAFTA parties that companies have used to challenge environmental regulatory measures.

1. *NAAEC*

The NAAEC, commonly referred to as the "environmental side agreement" to NAFTA, came into effect on January 1, 1994. The United States, Canada, and Mexico are the three parties to the NAAEC. The NAAEC creates a Commission for Environmental Cooperation (CEC). The CEC carries out cooperative initiatives in four major program areas: (1) Environment, Economy, and Trade; (2) Conservation of Biodiversity; (3) Pollutants and Health; and (4) Law and Policy. The CEC also administers the North American Fund for Environmental Cooperation (NAFEC), a grant program that provides funding for community-based environmental projects in Canada, Mexico, and the United States. Another significant CEC responsibility is to implement a "citizen submission" process, in which citizens may file "submissions" asserting that any of the three signatory countries is not enforcing its environmental laws effectively. This summary briefly discusses developments in these areas during 1999.

a. Environment, Economy, and Trade

The Environment, Economy, and Trade program works to sharpen understanding of the environmental impacts of trade liberalization. For the past four years, the CEC has concentrated its efforts on developing a methodology to assess the environmental impacts of NAFTA, which it completed in 1999. In October 2000, following a public call for papers, fourteen topics will be examined in detail at a two-day conference to be held at the World Bank in Washington, D.C. These topics cover a range of issues, including trade impacts on industrial pollution, forestry, fisheries, manufacturing location, trade in services, trade in electricity, and trade in freshwater resources.

b. Pollutants and Health

Within the Pollutants and Health program area, the CEC works to establish cooperative initiatives to prevent or address adverse effects of pollution on human and ecosystem health

in North America. The program has four main projects: Cooperation on North American Air Quality Issues; Sound Management of Chemicals; North American Pollutant Release and Transfer Register; and Pollution Prevention.

The North American air quality project attempts to address issues of continental air quality on two fronts: by initiating efforts to facilitate tri-national coordination in air quality management, and by sponsoring the development of tools needed to address North American air pollution issues. In 2000, the CEC is embarking on a new project to identify and address air quality and other environmental impacts associated with North American trade and transportation corridors.

The Sound Management of Chemicals project focuses on reducing the risks of persistent toxic substances to human health and the environment through the development of North American Regional Action Plans (NARAP), targeting substances such as PCBs, DDT, chlordane, lindane, lead, mercury, dioxins and furans, and hexachlorobenzene.

In spring 1999, the CEC Council called for NARAPs to be prepared for dioxins/furans and hexachlorobenzene, and environmental monitoring and assessment. Work on the environmental monitoring and assessment NARAP has not begun but is likely to begin soon. A Substance Selection Task Force, established to review substances nominated by a NAFTA government for possible regional action, continued its review of lindane and lead.

c. Law and Policy

The Law and Policy program area addresses regional priorities regarding obligations and commitments in the NAAEC related to environmental standards and their implementation. One aspect of this program, the Enforcement Cooperation Program, is designed to address the parties' obligation under article 5 of the NAAEC to "effectively enforce" their respective environmental laws.

One task group is currently preparing a guide on elements to enhance improvement of environmental performance and compliance through effective environmental management systems. It is expected that this guide will be released in June 2000 and will be available on the CEC web site.

Another project addresses ways to help the parties meet their "effective enforcement" obligation by promoting development of common criteria for evaluating the effectiveness of the enforcement and compliance strategies of each party. The Environmental Working Group (EWG) has chosen to focus on the area of hazardous waste for a pilot project on data collection and analysis in the development of these indicators. A preliminary report on lessons learned will be issued in 2000.

The CEC is also responsible for arranging the publication of the North American Environmental Law Report. The 1999 issue contains two major articles: "Environmental Impact Assessment: Law and Practice in North America" and "Public Access to Government-held Environmental Information: Report on North American Law, Policy and Practice." A complete list of CEC publications can be reviewed at <http://www.cec.org>.

d. Articles 14 and 15: Citizen Submissions Process[45]

Articles 14 and 15 of the NAAEC establish a process through which non-governmental organizations (NGO) or persons may file a submission alleging that a member country is

45. For a more detailed discussion of the CEC's citizen submissions process, see David L. Markell, *The Commission for Environmental Cooperation's Citizen Submissions Process*, 12 GEO. INT'L ENVTL. L. REV. 545 (2000).

not enforcing its environmental law effectively. The CEC secretariat reviews the submissions and determines whether they meet certain elements listed in the NAAEC. The secretariat requests a response from the appropriate party if the secretariat determines that further consideration of a submission is merited. Upon receiving the response, the secretariat may dismiss the submission or notify the Council that development of a "factual record" is warranted. The secretariat develops a "factual record" concerning the assertions if instructed to do so by a two-thirds vote of the Council. The Council may, by a two-thirds vote, make the factual record available to the public.

A total of twenty-six submissions have been filed since the Agreement went into effect in January of 1994. Of these, nine involve Mexico, nine involve Canada, and eight involve the United States. Ten of these submissions are no longer pending (most of these have been dismissed by the secretariat, one was withdrawn by the submitter, and one was the subject of a factual record). The other sixteen are currently pending. In June 1999, the CEC Council, which oversees the operations of the CEC, adopted Resolution 99–06 to revise existing guidelines for submissions under articles 14 and 15. The parties continue to negotiate the need for, and potential nature of, additional modifications to the guidelines.

The following table summarizes the work the CEC Secretariat has completed concerning submissions filed under article 14 from 1995 through 1999.

Table 1
History of Actions Taken by the CEC Secretariat under Articles 14 and 15

Year	Total No. Actions Taken	14(1), 14(2) Determin. re Continuing the Process	14(1), 14(2) Dismissals	Article 21(1)(b) Requests	Dismissals Following Response	Notifications to Council	Draft FR	Final FR
1999	16	11	2	1		2		
1998	11	6	3	1		1		
1997	10	6	1		1			
1996	9	6	2			1		
1995	5	2	3					

2. *NAFTA Chapter 11*

Chapter 11 of NAFTA establishes special international rights and remedies for foreign investors in the three NAFTA countries. Following the development of many bilateral investment treaties over the past few decades, chapter 11 represents the first time legally binding and enforceable obligations and rights between states and private investors were included in a multilateral trade agreement. In fact, chapter 11 created what is now recognized as the most extensive combination of obligations, rights, and remedies ever given to the private sector in an international agreement.[46]

46. The chapter 11 obligations on the three NAFTA states include: (1) ensuring national treatment of foreign companies compared to domestic counterparts; (2) not imposing so-called performance requirements on in-

To enforce these rights and obligations, chapter 11 provides a special remedy for foreign investors in the form of mandatory and binding investor-state arbitration.[47] The initiation of this arbitral process is at the sole discretion of the foreign investor and is fully binding on the host state. An investor initiates a case by serving the host government with a notice of intent to arbitrate, triggering a mandatory ninety-day consultation period between the government and the investor. Thereafter, arbitration can be formally launched with a notice of arbitration.

As of the end of 1999, some thirteen cases had been initiated under chapter 11.[48] Of these, eight relate to law-making or administrative decision-making in an environmental context. At the start of 1999, however, only one of the environmental cases had concluded, resulting in a settlement between Canada and Ethyl Corp. of the United States, the sole manufacturer of the gasoline additive MMT, in which Canada agreed to withdraw new environmental legislation that had banned the import of MMT and to pay Ethyl $13 million in compensation.[49]

a. Developments in 1999

In 1999, each NAFTA country saw some chapter 11 case activity. In Canada, a challenge brought by S.D. Meyers began to move through the United Nations Commission on International Trade Law (UNCITRAL) arbitral process. S.D. Myers had initiated arbitration in 1998 following the adoption by Canada of a regulation to block the export of Canadian PCB waste to the United States.[50] Oral arguments in the case were scheduled for February 2000. This is the first Canadian case to proceed to the hearings stage.

Very critical from an environmental resource management perspective was the expansion of issues in another Canadian case, initiated in 1998 by Sun Belt Water of California, and based upon British Columbia's 1991 enactment of a prohibition on fresh water exports.[51] Sun Belt, a partner in a joint venture with a Canadian company to sell Canadian water in the United States, claimed Canada had breached the national treatment and minimum international standards obligations of chapter 11 by compensating the Canadian joint venture partner but not Sun Belt. However, in October 1999, Sun Belt amended its notice, claiming that the water export ban itself amounted to an expropriation of Sun Belt's water

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vestors, such as requirements to undertake all or some of its operations, purchasing, or sales in the host country; (3) treating foreign investors in accordance with minimum international standards; and (4) not expropriating, or taking measures tantamount to expropriation as it relates to a foreign investor, without a proper public purpose and payment of full compensation. A full description of the rights and remedies in chapter 11 is found in Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment*, Working Paper of the International Institute for Sustainable Development (1999), *available at* <http://www.iisd.ca>.

47. This process is set out in part B of chapter 11.

48. Due to a lack of transparency requirements in chapter 11, it is possible more cases were initiated but remain unknown.

49. *See* Minister of the Environment and Minister of Industry, *Government of Canada to Act on Agreement on Internal Trade Panel Report on MMT*, News Release (July 20, 1998).

50. Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, S.D. Myers Inc. v. Canada (Oct. 30, 1998); Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, S.D. Myers Inc. v. Canada (Oct. 30, 1998) (made public under an order of the UNCITRAL arbitral panel on June 10, 1999).

51. *In re* North American Free Trade Agreement, Chapter 11, Notice of Intent to Submit a Claim to Arbitration, Sun Belt Water Inc. v. Canada (Nov. 28, 1998).

export rights. Sun Belt also increased its damages claim from $220 million to $1.5 billion. The expansion of Sun Belt emphasizes fundamental questions regarding a government's ability to alter its natural resource management laws in the face of the chapter 11 regime.[52]

The United States, in June 1999, received its first notice of intent to arbitrate in an environmental case. Canadian-based Methanex Corp. filed the notice after California adopted a law banning the sale of MTBE, a gasoline additive, in California after 2002. The claim in this case is for $1 billion.[53] The Methanex case has implications for the Environmental Protection Agency's (EPA) broader efforts to establish a national MTBE regulatory regime.

Mexico's lawyers had a particularly busy year, with all three of Mexico's environment-related cases progressing to oral hearings in 1999. Decisions in the *Metalclad* and *U.S. Waste* cases are expected to be released in 2000.[54] A decision in the *Desona* case,[55] which was brought following the cancellation by a local municipality of Desona's fifteen-year contract for waste management and removal, was released in November 1999. After losing several appeals of the administrative decision in the Mexican courts, Desona initiated the chapter 11 proceeding, claiming a breach of the expropriation and minimum international standards of treatment obligations. As the first chapter 11 panel to reach a conclusion on the merits, the panel unanimously rejected Desona's claim and took the opportunity to express its views on the scope of chapter 11.

The panel held that a breach of contract in itself did not support a chapter 11 case, unless accompanied by a specific breach of chapter 11 obligations. As the administrative decision to cancel the contract was supported by three levels of courts, the panel found that a breach of chapter 11 would have to be based on a breach of the chapter 11 obligations by the courts themselves. For a court decision to violate chapter 11, the panel concluded that an investor must show either "a denial of justice or a pretence of form to achieve an internationally unlawful end." A denial of justice might arise if the courts refused to entertain a suit, subjected the investor to undue delay, or administered substantially inadequate justice. In the *Desona* case, however, no denial of justice was alleged or shown to exist.

While of limited relevance to environmental issues, the *Desona* panel's decision could have broader implications for other chapter 11 cases that address the impact of legal processes on foreign investors. In particular, the clarification of the role of a chapter 11 panel as a body to determine whether a breach of NAFTA's chapter 11 has occurred, not as an appeals court for administrative decisions or the decisions of the courts, is useful. Similarly useful is the stated requirement that investors must carefully pinpoint the alleged breach of chapter 11 to maintain a claim.

52. It also had the potential to revive a major public issue at the time of the ratification of NAFTA by Canada: a guarantee by trade negotiators that the agreement did not impact on freshwater management or compel water to be exported from Canada.

53. Notice of Intent to Arbitrate, Methanex Corp. v. United States (June 15, 1999). A formal notice of arbitration was anticipated as this paper was finalized.

54. Metalclad Corporation v. United Mexican States (Case No. ARB (AF)/97/1); Waste Management Inc. v. United Mexican States (Case No. ARB(AF)/98/2). Both cases are proceeding under secrecy at the International Centre for the Settlement of Investment Disputes (ICSID), under the so-called Additional Facility rules. There are no documents available at time of writing.

55. Award, Robert Azinian v. United Mexican States, Case No. ARB(AF)/97/2) (Nov. 1, 1999). This case is proceeding at the ICSID under the Additional Facility rules.

Politically, the expansion of the Sun Belt case and the Methanex case both fostered concern over the impact of chapter 11 on environmental management and regulatory regimes.[56] The Methanex case in particular provided an important backdrop to the June 1999 meeting of the three NAFTA environment ministers acting as the Council of the Commission for Environmental Cooperation (created by the NAAEC). Their annual council communiqué addressed chapter 11 and offered that the CEC assist the Free Trade Commission (FTC) in finding solutions to the challenges raised by chapter 11.[57] This was the first time the CEC council has specifically addressed a NAFTA text-based topic. By June 1999, however, the FTC was no longer considering the issue and it had not agreed to resume its discussions at the end of the year.

b. Preview for 2000

Some key environmental cases will proceed to hearings or decisions during 2000. Oral hearings in the *S.D. Myers* case were anticipated to begin in February 2000. The decision in the *Mexican Metalclad* case was anticipated in January 2000, but was not yet announced as February began. The decision in *U.S. Waste*, the third Mexican environment-related case, is anticipated for later in the year. Formal Notices of Arbitration are also expected to be sent to the U.S. and Canadian governments in the *Methanex* and *Sun Belt Water* cases, respectively. These two cases will most likely stimulate new public questions and concerns over the impact of chapter 11.

On the political front, a quick canvass of the numerous web sites that covered the WTO Ministerial Meeting in Seattle reveal the enormous impact chapter 11 cases have had in fueling anti-trade and investment law protests. These cases provide ready examples of how private companies can and do use trade law to limit and vitiate environmental laws. This political dimension of chapter 11 is likely to increase, especially if the number of environment-related cases increases. Decisions in favor of the states involved may reduce both the number of cases and the political impacts of their initiation. However, decisions in favor of the investors will provide ammunition for those seeking to limit or reverse trade liberalization.

B. U.S. Overseas Private Investment Corporation

The Overseas Private Investment Corporation (OPIC) is a self-sustaining U.S. government agency created pursuant to the Foreign Assistance Act of 1961 (FAA) as amended.[58] OPIC's purpose is to mobilize and facilitate U.S. private investment, through the provision of investment support, in developing countries and emerging market economies. OPIC's

56. As a result of the increased use of chapter 11, including strategic lobbying use, see Alan Rugman et al., *Environmental Regulations and Corporate Strategy: A NAFTA Perspective* (1999). In 1998, Canada proposed the adoption of an Interpretive Statement pursuant to article 1126(2) of NAFTA, which would become binding on all arbitral bodies in accordance with that article, to clarify the obligations in chapter 11. The EPA supported this approach throughout 1999, though the position of the trade-related agencies was less clear. Canada's effort was opposed by Mexico, however, which continues at the time of writing, to block any further discussions of the issue. For further information, see IISD Working Paper, *supra*, sec. 1.4 n.1, and the references noted therein.

57. *Final Communiqué, 6th Annual Meeting of the Council of the Commission for Environmental Cooperation* (June 28, 1999).

58. Foreign Assistance Act, 22 U.S.C. § 2191 *et seq.* (as amended).

Mission Statement includes the proviso that OPIC will assure that projects it supports are consistent with sound environmental and worker rights standards.[59]

OPIC's mandate for addressing the environmental implications of its support programs is drawn from U.S. statutes and executive orders dating back to the mid-1970s. In 1974, OPIC's statute incorporated hortatory language directing it to encourage investors to mitigate the environmental impacts of projects. This was supplemented by Executive Order 12,114 of 1979, entitled "Environmental Effects Abroad of Major Federal Actions," for which implementing regulations were published in the *Federal Register* in August 1979.

In 1985, Congress amended the FAA. The OPIC Amendments Act of 1985,[60] which amended sections 231 and 237 of the FAA, required that OPIC assess the environmental impacts of projects under consideration for its support. These amendments directed OPIC to refuse to provide support to any investment connected with a project that it determines "will pose a major or unreasonable environmental health or safety hazard, or will result in the significant degradation of national parks or similar protected areas."

Executive Order 12,114 also applies to the overseas actions of U.S. federal agencies, and requires federal agencies to adopt procedures to ensure that the agency considers all significant environmental effects of its activities outside of the United States. Aside from the implementing regulations for Executive Order 12,114, until 1996, OPIC relied on internal procedures to guide its implementation of the environmental provisions of its statute. To document its environmental procedures for investors and the public, OPIC released a draft Environmental Handbook in December 1996. This document was subject to several rounds of public comment and review before a revised Environmental Handbook was released in final version in April 1999 (the Handbook).

The final version of the Handbook reflects the comments submitted by interested stakeholders as well as general policy initiatives announced by President Clinton at the U.N. Special Session on the Environment (UNGASS) in June 1997.

1. *OPIC Environmental Handbook*

The Handbook constitutes a comprehensive articulation of OPIC's environmental policies and procedures. Noteworthy aspects of the Handbook include a list of categorical prohibitions describing the types of projects that, based on statutory or policy grounds, OPIC will not support. Among these are prohibitions against supporting infrastructure or extraction projects located in primary tropical forests, projects impacting UNESCO World Heritage Sites, and projects involving resettlement of more than 5,000 persons. Under these categorical prohibitions, OPIC also will not support projects involving the construction of "large dams" that significantly and irreversibly disrupt natural ecosystems, alter natural hydrology, inundate large areas of land, or that impact biodiversity or compromise the

59. Unlike the Export-Import Bank of the United States, OPIC does not provide export credits for financing the overseas sales of U.S. goods and services. In a bilateral context, OPIC insurance activities are similar to and complement the non-commercial risk insurance programs offered by the World Bank Group's Multilateral Investment Guarantee Corporation (MIGA). Its finance activities are generally comparable to those of the World Bank's International Finance Corporation. For eligible investors, OPIC provides political risk insurance and financing. OPIC also supports privately managed equity funds. OPIC issues insurance and financing under limits fixed by statute in the FAA. OPIC political risk insurance covers investments for up to 20 years against the following three risks: inconvertibility of currency, expropriation, and political violence.

60. Overseas Private Investment Corporation Amendments Act of 1985, Pub. L. No. 99–204, 99 Stat. 1669 (1985).

ability of local inhabitants to earn a livelihood. Because of this prohibition, OPIC turned down support for several dam projects in Fiscal Year 1998. The Handbook also contains a list of environmental screening criteria through which eligible proposed projects are analyzed based on the degree of environmental sensitivity involved.

The procedures articulated in the Handbook require that for all projects that OPIC determines are likely to have significant adverse environmental impacts that are "sensitive, diverse or unprecedented," the project applicant must submit an Environmental Impact Assessment (EIA) in a form that can be made publicly available without compromising investor business confidentiality. In determining the degree of environmental sensitivity entailed by a proposed project, the Handbook relies upon guidelines and standards adopted by international organizations such as the World Bank and the International Finance Corporation (IFC). The Handbook states that OPIC applies the most current World Bank guidelines that are applicable to a project. The final version of the Handbook can be accessed via OPIC's web site at <http://www.opic.gov>.

2. *Public Comment and Review of Proposed Projects*

OPIC policies require it to inform the public about proposed environmentally sensitive projects under consideration for OPIC support. For environmentally sensitive projects, investors are obliged to disclose for public review and comment for a period of sixty days, via OPIC's web site, the availability of an EIA of the proposed project.

In 1999, OPIC required that an investor obtain comments and consult directly with indigenous and other local communities concerning the environmental and socio-economic aspects of a pipeline project in Latin America. OPIC's procedures for public disclosure of EIAs regarding environmentally sensitive projects provide many groups in developing countries with their first meaningful opportunity to make their concerns known and to participate actively in local and national development decision-making processes.

3. *Annual Environmental Report*

In early 1999, OPIC also issued its first Annual Environmental Report (AER). This first edition relates to OPIC activities during Fiscal Year 1998. The second AER is due for release in April 2000. The AER is a voluntary undertaking that is part of a set of OPIC environmental initiatives proposed by President Clinton at the UNGASS in June 1997. At the time of UNGASS, OPIC agreed to report each year to the U.S. Congress and the public regarding its implementation of and compliance with internal, national, and international environmental policies, conventions, and other legal norms and instruments to which its programs are subject.

4. *Harmonization of International Environmental Standards*

One key issue on which industry, the U.S. Congress, the Clinton administration, and environmental NGO groups are in agreement is the need for the development of common environmental standards. This is another area in which OPIC has been active in both 1998 and 1999.

Throughout 1999, OPIC continued initiatives to promote harmonization of environmental standards. OPIC staff members met with representatives of its development finance counterparts from Germany, Japan, and Canada. This strategy is part of a larger U.S.-led effort within the OECD to encourage the development of common environmental standards for export credit institutions supporting projects in developing countries.

In September 1999, OPIC Environment Unit staff attended the United Nations Environment Programme's 5th Annual Round Table Meeting on Finance and the Environment, which was held in Chicago, Illinois. The meeting, entitled "New Roles for Finance in the Race to Sustainability," analyzed the increasingly important role played by private sector financial institutions in facilitating sustainable development. Participants sought to clarify the opportunities and constraints presented to the international financial community when making decisions that impact on environmental quality, particularly in developing countries. At the meeting, OPIC's Handbook was noted as a positive example of promoting transparency and a level playing field for environmental standards harmonization in international investment activities.

OPIC has stated that it recognizes that its policies directed at mandating the use of internationally recognized environmental standards in OPIC-supported projects carry a risk of undermining U.S. industry's competitiveness. Therefore, OPIC has been making a concerted effort to encourage its foreign bilateral agency counterparts, as well as its private sector partners, to recognize the importance of the environment to the long-term viability of the projects they support, and to integrate environmental considerations into their investment decision-making.

In 1998 and 1999, OPIC also consulted regularly with the multilateral agencies, particularly the IFC, the European Bank for Reconstruction and Development (EBRD), and the Inter-American Development Bank (IADB), in its efforts to facilitate improvements in environmental procedures and performance. In 1999, OPIC hosted a meeting of international financial institutions to discuss alternative approaches to conducting due diligence and oversight regarding the environmental impact of intermediary financial institutions (e.g., private equity funds and on-lending institutions).

C. Looking toward the Future

In light of the efforts made by OPIC during the past few years to formulate the Handbook as a means for articulating its environmental policies and procedures, it is very likely that project monitoring to ensure compliance with the Handbook and environmental conditions in project contracts, based on the World Bank guidelines and other internationally recognized standards, will play an increasingly important role in the activities of OPIC's Environment Unit. OPIC's small but very active Environment Unit staff will continue to concentrate on ensuring project compliance through in-country site monitoring and due diligence review visits.

The year 2000 will also provide OPIC with an opportunity to assess the application of various aspects of the Handbook to project-specific situations. One project, which has enabled OPIC to evaluate the implementation of the Handbook, is the Cuiaba Integrated Power Project, to which OPIC committed financing in 1999. This project involves the construction of a natural gas pipeline crossing ecologically sensitive habitats in Bolivia and Brazil. It has raised significant issues within the NGO community concerning OPIC's reliance on and utilization of the World Bank's definition of primary tropical forest. During 2000, OPIC will undertake a review in close consultation with other U.S. government agencies to establish an operational framework for applying this definition of primary tropical forest when screening proposed projects.

D. World Bank

The World Bank consists of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). It makes loans and provides credits to borrower governments. It also provides advice and technical assistance. These World Bank institutions are two of five institutions collectively known as the "World Bank Group," in addition to the IFC, addressing private investment, the Multilateral Investment Guarantee Agency (MIGA), which facilitates and encourages private investment, and the International Centre for Settlement of Investment Disputes (ICSID), which provides a forum for resolving disputes between foreign investors and host countries. This discussion focuses on the activities of the two World Bank institutions.

1. *Overview of Activities in 1998 and 1999*

The years 1998 and 1999 have been particularly active for those at the World Bank (Bank) who are responsible for dealing with the organization's environmental policies and related standards. For several years, the World Bank has been reviewing its Operational Directives and related internal policy and procedure instruments, with the objective of clarifying the normative content of these texts, improving their scope, and ensuring greater compliance with them.

The extant Operational Directives are mandatory internal policy and procedure instruments of the Bank. To clarify which internal operational norms are mandatory and which are of recommendatory nature, the World Bank is reorganizing its operational documents into three categories: Operational Policies (OPs), Bank Procedures (BPs), and Good Practices (GPs). Operational Directives will eventually be replaced or reformulated among these categories of instruments.

The three categories fall into a normative hierarchy. Both OPs and BPs are mandatory in nature. They flow from the Bank's articles of agreement, and set out general conditions and policies approved by the World Bank's Board of Directors. OPs contain substantive provisions and are minimum standards that Bank officers must comply with when engaging in investment decisions and operations. OPs establish a framework for the conduct of World Bank activities to address particular environmental and related topics, such as environmental impact assessment, natural habitats, or indigenous peoples. BPs contain procedural provisions, and articulate the procedures and documentation to ensure consistency among World Bank staff in executing the policies established in the OPs. The GPs are advisory texts that provide historical background information on a given issue and suggest best practices for implementing an OP.

To provide a detailed discussion of all of the wide-ranging efforts undertaken by World Bank staff to overhaul the organization's operational instruments is beyond the scope of this discussion.[61] Therefore, this discussion will assess measures taken by the Bank to update, refine, and reconstitute three of its most important operational policy documents that concern environmental protection and the promotion of sustainable development. These three documents concern Indigenous Peoples, Involuntary Resettlement, and Forests.

61. For example, a Prototype Carbon Fund to demonstrate how project-based emission reductions transactions under the United Nations Framework Convention on Climate Change can promote sustainable development in borrower countries, is just one of the many innovative law and policy mechanisms being explored by the Environment and International Law Unit of the Bank's Legal Department.

a. Indigenous Peoples

In 1982, the World Bank issued Operational Manual Statement (OMS) 2.34 on "Tribal People in Bank-financed Projects." This document represented the first attempt by a multilateral institution to produce a specific policy on the treatment of indigenous and tribal peoples. OMS 2.34 was crafted by World Bank staff, and is directed at mitigating the negative effects experienced by indigenous communities as a result of World Bank-supported projects. In light of concerns over difficulties arising out of the implementation of OMS 2.34[62] and changing international standards concerning the rights and interests of indigenous peoples, such as the promulgation of International Labour Organisation (ILO) Convention number 169, "Indigenous and Tribal Peoples, 1989" (ILO 169), the Bank issued Operational Directive (OD) 4.20, "Indigenous Peoples" in 1991. OD 4.20 has been widely recognized by academics and the NGO community as a seminal document for many reasons, but in particular, that this document affirms the World Bank's official recognition of the unique challenges confronting indigenous peoples in development projects.

OD 4.20 reflects the normative content of ILO 169 in that, although governments have the responsibility for developing policies for protecting the rights of indigenous peoples, the affected indigenous communities are to be accorded the right to participate, through consultation or otherwise, in the decision-making process, and to benefit from the proposed development project.[63]

At present, the World Bank is converting OD 4.20 into Operational Policy (OP) 4.10. To facilitate this effort, the Bank has constituted a Working Group comprised of social and legal experts drawn from the World Bank and the IFC, one of the private sector-oriented bodies of the World Bank Group. In July 1998, the Working Group drafted and released a draft Approach Paper on Revision of Indigenous People's Operational Directive OD 4.20 (Approach Paper). NGOs have argued that in order for OP 4.10 to improve upon substantive and implementation deficiencies in OD 4.20, the Working Group should expressly consult with indigenous communities that have already been affected by World Bank-sponsored development projects. Indigenous peoples' advocates have also called upon the Working Group to obtain comments from indigenous groups from all regions in which the Bank is active and to ensure that the input obtained from these groups is substantively reflected in the new OP document.

In converting OD 4.20 into OP 4.10, the World Bank will focus on difficulties encountered in implementing the OD. One issue the World Bank seeks to address more effectively in the OP is the definitional scope of the term "indigenous peoples," used to identify the target populations for the instrument. The Bank has recognized that there are complex socio-political and economic ramifications in borrower nations connected with use of the term "indigenous," and that a diversity of terminology is employed in countries and regions to describe particular groups such as "tribal," "aboriginal," or "national minorities."

62. For example, see D. Maybury-Lewis et al., *In the Path of Polonoreste: Endangered Peoples of Western Brazil, in* CULTURAL SURVIVAL (1981).

63. Although the World Bank has an established policy not to finance projects that violate international environmental treaty obligations of the project borrower state, it has not publicly agreed explicitly to conform its operations to the norms contained in ILO 169. ILO 169 is technically a human rights convention and to date, the World Bank has not taken such an expansive view of what constitutes an "environmental" instrument. *See* B. Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples, in* GUY S. GOODWIN-GILL & STEFAN TALMON, THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 323 (1999).

The Approach Paper affirms that the World Bank will continue to employ the term "indigenous peoples" to characterize all of these populations, but will introduce a process that also: (1) relies upon host country laws concerning specific definitions and legal frameworks for respective populations; (2) interfaces with ILO Conventions 107 and 169 regarding indigenous peoples, if the borrower has ratified either or both of these instruments; (3) involves consultation with NGOs, indigenous organizations, academic, and government experts; and (4) contains functional criteria (based on language contained in OD 4.20) relating to group self-identification, cultural distinctiveness, language, presence of customary socio-political institutions, and vulnerability to being disadvantaged in relation to other groups in the development process.

One practical challenge for the World Bank's strategy on "indigenous peoples" is that World Bank-financed projects also can have substantial positive or negative impacts upon other communities that do not fall under the umbrella term "indigenous." According special treatment to those groups identified as "indigenous," while excluding other vulnerable social or cultural groups from the protections afforded by the OP could serve to polarize communities and undermine positive development efforts. NGOs have recommended that in reconstituting its policy on indigenous peoples, the Bank should develop a broader based social policy that takes into consideration, via consultation (or other participatory mechanisms) and benefit-sharing, the rights and interests of other local occupant communities affected by the development initiative.

The Approach Paper also contains a list of Minimum Safeguard Conditions. These are designed to ensure that the World Bank will not appraise a project affecting indigenous peoples "unless the potential adverse impacts are identified through disclosure of relevant information and meaningful consultation with the affected population and suitable mitigation measures are developed by the Bank." The statement advocating "meaningful consultation" accords with the views expressed in recent international instruments such as the Draft United Nations Declaration on the Rights of Indigenous Peoples.[64] However, the OP does not recognize a paramount right of the affected community to veto the project.

The Approach Paper remains a draft text, subject to further revision in 2000.

b. Resettlement

The involuntary resettlement of large numbers of indigenous peoples and other local populations has been one of the most controversial aspects of World Bank-sponsored development projects in borrower countries. Based on several decades of experience, the World Bank has recognized that displacement of communities from their traditional lands has wide-ranging and sometimes unforeseen socio-cultural, political, economic, and environmental implications for the resettled populations and for the inhabitants of the areas to which these groups are resettled.[65] Concerns that involuntarily resettled populations have often found themselves in worse circumstances as a result of the development project and the resettlement measures[66] have brought environmental, human rights, and other advocates

64. Draft United Nations Declaration on the Rights of Indigenous Peoples, Aug. 26, 1994, 34 I.L.M. 541.

65. This aspect of involuntary resettlement is expressly acknowledged in the statement of policy objectives of OD 4.30 and Draft OP 4.12.

66. *See generally* BRUCE RICH, MORTGAGING THE EARTH: THE WORLD BANK, ENVIRONMENTAL IMPOVERISHMENT, AND THE CRISIS OF DEVELOPMENT (1994).

together in a united effort to halt, or otherwise to minimize, the negative ramifications experienced by relocated communities and their environmental resources.

The World Bank's first policy statement on resettlement was an Operational Manual Statement written in 1980. This document was crafted to address World Bank-supported large dams and other major infrastructure projects. In an attempt to mitigate the most negative aspects of involuntary resettlement, the World Bank issued OD 4.30, "Involuntary Resettlement," in June 1990. This instrument expressly expanded the scope of the Bank's resettlement policy to all World Bank-supported investment projects that involved resettlement. In 1994, it undertook a major review of its experience with project-related resettlement.[67] The review indicated that a substantial number of the projects that were the subjects of the study had not met to varying degrees the objectives set out in OD 4.30. The World Bank has taken into consideration lessons learned as a result of this undertaking in its drafting of later initiatives concerning resettlement.

As part of its ongoing effort to convert ODs, the World Bank is currently reformulating OD 4.30 as part of the tripartite OP/BP/GP 4.12. The OP will apply to physical and economic displacement resulting from the taking of land or other assets due to the development project. The OP, however, does not apply to indirect social or economic impacts experienced by displaced communities, or to situations where the resettlement is characterized as "voluntary."

In preparing the OP/BP on involuntary resettlement, it established a World Bank "Resettlement Thematic Group" and held several rounds of consultations with NGOs and other interested parties between 1997 and the end of 1999. The current draft of the OP/BP 4.12, which is available on the World Bank's web site, was released on June 22, 1999. In the statement of policy objectives, both OD 4.30 and Draft OP 4.12 characterize involuntary resettlement as an activity that "should be avoided or minimized where feasible, exploring all viable alternative project designs." Critiques of Draft OP 4.12, which the World Bank has reproduced on its web site, have argued that on human rights and other grounds, the Bank should abandon its policy on involuntary resettlement in favor of a "Resettlement Policy." The underlying premise of this policy would be that the World Bank should make every effort to avoid resettlement unless the target population freely gives its prior informed consent.

On the issue of the standard of compensation to be provided to the resettled population, both the OD and the OP state that displaced persons "should be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them, in real terms, to pre-displacement levels or to levels prevailing prior to beginning of project implementation. . . ." Commentators from the NGO community and elsewhere contend that inclusion of restoration of the displaced population to its pre-displacement standard of living, as a policy objective, conflicts with the sustainable development mandate of the Involuntary Resettlement Policy. These observers assert that in order to facilitate its development mandate, the resettlement policy must be directed solely at the improvement of the livelihood and living standards of the affected population.

Although the World Bank has stated that the conversion from OD 4.30 to Draft 4.12 does not constitute a revision of the World Bank's policy on involuntary resettlement, the

67. World Bank, *Resettlement and Development: A Bankwide Review of Projects Involving Involuntary Resettlement 1986–1993* (April 1994).

language of the OP differs from that of the OD in several notable respects. Because of space limitations, this note will discuss only textual modifications in the provisions concerning the standard for compensation and those groups eligible to receive compensation in light of displacement and resettlement. As a policy objective, OD 4.30 states that "[l]and, housing, infrastructure and other compensation should be provided to the adversely affected population. . . ."

In contrast, OP 4.12 states that "[l]and-based resettlement options should be offered to displaced persons whose livelihoods are land based." OP 4.12 also says that "Bank experience has shown that the payment of cash compensation for lost assets may be appropriate where livelihoods are land based but the land taken for the project is a small fraction [characterized, as "a general principle" to mean "if the land taken constitutes 20% of the total productive area"] of the affected asset and the residual is economically viable. . . ." OD 4.30, however, expressly notes "[e]xperience indicates that cash compensation alone is normally inadequate."

In the context of intended beneficiaries of the compensation provided by the policy, OD 4.30 articulates as a policy objective that "[p]articular attention should be paid to the needs of the poorest groups to be resettled" and that "absence of legal title to land" by groups having "usufruct or customary rights to the land or other resources" obtained for the project "should not be a bar to compensation." In its statement on compensation, OD 4.30 also noted among those groups "most vulnerable at particular risk" in the resettlement process are "indigenous people, the landless and semi-landless, and households headed by females who though displaced, may not be protected through national land compensation legislation."

In contrast, OP 4.12 provides eligibility for compensation to those persons, inter alia, who do not have formal legal rights to land or other assets, but only where their claim to such resources or land is recognized by the laws of the country or becomes recognized through a process identified in the resettlement plan. Thus, OP 4.12 makes it much more difficult for groups holding land or utilizing resources pursuant to traditional or customary regimes to be eligible for compensation.

c. Forestry

The principal World Bank operational instruments concerning forests are "The Forest Sector: A World Bank Policy Paper" of June 18, 1991, and OP 4.36 "Forestry" of September 1993. OP 4.36 is based on the June 18, 1991 document, and articulates how the World Bank executes its Forest Policy. At present, the World Bank is conducting a Forest Policy Implementation Review, and is developing a strategy to guide its work in the forest sector.

The current Forest Policy Implementation Review and Strategy (FPIRS) is being conducted by the World Bank's Operations Evaluation Department (OED). The objective of this OED review is to assess its performance to date, as a means for crafting a new proposed Bank forest sector strategy. On January 13, 2000, the OED released its report entitled, " A Review of the World Bank's 1991 Forest Strategy and Its Implementation" (OED Report).

The OED Report draws upon comments of World Bank departments, including rural development, environment, and social development, as well as input from a variety of external sources, including NGOs, governments, forestry experts, and other stakeholders. The goal of this process was to ensure that the FPIRS was conducted in an open, consultative manner, and that the future forest policy strategy will be grounded in transparency and engagement with all interested parties. The FPIRS agenda included regional consul-

tations in various capital cites in Asia, Africa, Latin America, Europe, and elsewhere. Notes regarding these consultation meetings, as well as comments received from external parties, are posted on the World Bank web site.

The OED Report makes a number of significant observations and recommendations for the future forest sector policy. Its overall conclusion is that the World Bank has been only partially successful in implementing the 1991 Forest Strategy and that the implementation has been carried out principally through an increased number of forest-related components in the institution's lending for environmental purposes. The OED Report noted that among the major achievements of the 1991 Forest Strategy has been the raising of awareness within the World Bank, and the refocusing that has resulted of its operational priorities away from projects that previously were identified as contributing to deforestation.

The OED Report indicates, however, that the Bank's existing forest policy needs to take better account of socio-economic and other systemic realities that are exacerbating deforestation, and needs to be more attuned to the concerns of developing countries; and that it focuses on conservation of tropical moist forests, while neglecting other endangered forest-types such as boreal forests. One of the primary findings of the OED Report is that the 1991 Forest Strategy's ban on World Bank support for projects involving logging in tropical moist forests had a negligible impact on slowing the rate of deforestation in the countries studied. Other significant observations contained in the OED Report include that poor governance, corruption, and political alliances had contributed to wasteful methods of exploitation of forest resources; and that contrary to assumptions contained in the 1991 Forest Strategy, the poor have been less of a source of deforestation than the growing domestic demand for fuel-wood industries and the demand for tropical forest products for the international market.

The OED Report is notable not only for the specific findings that it made, but also because the sometimes direct criticisms of apparent World Bank failures relating to the 1991 Forest Strategy have been incorporated into an official World Bank publication. This aspect of the OED Report suggests a firmer commitment to accountability and openness regarding past shortcomings, at least with regard to this important policy sector.

E. WTO

The World Trade Organization (WTO) is a significant forum due to its ability to affect development of national and international environmental, health, and safety (EH&S)[68] law. In 1999, the WTO Ministerial held in Seattle and other events of interest took place both in and outside the WTO. In addition, some developments of note occurred relating to the settlement of disputes between and among WTO members.

1. *Developments in 1999*

a. The Seattle Ministerial

The Seattle Ministerial, held from November 30 to December 3, 1999, was significant for several reasons, including, but not limited to, the demonstrations concerning trade and

68. These issues are often referred to as "trade and environment" issues because discussion has often concerned the relationship between trade rules and measures to protect the environment in particular. However, the relationship between trade rules and measures taken to protect public health and safety raise many of the same issues and, more recently, has become an increasingly important focus of debate. For this reason, this discussion refers to the category of issues more broadly as environmental health and safety, or "EH&S" issues.

environment (among other) issues that took place outside the meetings. Official meetings held with NGOs reflected the level of willingness among WTO members to involve civil society directly in the work of the WTO. The WTO also entered into a cooperation arrangement with UNEP. This arrangement marks the beginnings of an effort by the WTO and UNEP (under whose auspices were negotiated most of the global, and many of the regional, agreements developed to date to address EH&S issues) to work together on trade-related EH&S issues. While this effort between the WTO and UNEP is only in its early stages, it may facilitate resolution of some of the more difficult tensions between international trade and EH&S regimes and rules.

In addition, while the Seattle Ministerial did not reach any conclusions concerning how EH&S issues may be addressed in a next round of negotiations, it appears that negotiations may include a number of important issues relating to EH&S. More specifically, in response to member proposals prior to Seattle and to the "built-in agenda" of issues that the WTO membership agreed during the Uruguay Round to address in later negotiations, it appears that six general EH&S topics of particular interest may be on the table.[69] The WTO membership might attempt to resolve these issues in a variety of ways, ranging from adoption of Ministerial decisions or resolutions to reopening of certain WTO agreements, including the General Agreement on Tariffs and Trade (GATT), the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on Trade Related Intellectual Property Rights (TRIPS Agreement), and the Dispute Settlement Understanding (DSU).

Precautionary Principle/Approach. First, the European Union called for the membership to reassess the role of sound science and the application of the "precautionary principle/approach" under WTO trade agreements. Essentially, members hold differing views on what should be considered a justifiable precautionary EH&S measure, i.e., what sort of scientific evidence should be required to support an EH&S measure.

EH&S Product Labeling. Second, the European Union and Norway submitted formal proposals to clarify under what circumstances WTO agreements allow members to establish EH&S product labeling schemes. This topic involves two sub-topics. First, under what circumstances may a WTO member establish a labeling regime to identify products based upon whether the product was manufactured consistently with a particular EH&S standard (concerning, e.g., pollution, harvesting methods, or overall environmental impact during the product's life-cycle, or health or safety risks to workers), even though the imported product itself does not pose an EH&S risk. Second, may a WTO member establish a labeling scheme to identify characteristics of the product itself if there is little or no scientific evidence that the characteristics present an EH&S risk. Labeling issues will be addressed as part of the second triennial review of the TBT Agreement.

Relationships between WTO Agreements and MEAs. Various WTO members would, in addition, like to address the relationship between WTO trade agreements and multilateral environmental agreements (MEA).[70] The primary question is whether WTO members

69. Additional significant EH&S topics proposed for negotiation include elimination of subsidies that could jeopardize fisheries.

70. The catch-all "multilateral environmental agreement" or MEA, while widely used, is an underinclusive term because it does not clearly encompass international agreements that address health and safety concerns. Nonetheless, MEA is used for convenience in this discussion, for lack of a similarly succinct and widely used term.

should be able to impose trade sanctions upon other WTO members under an MEA because these other members are not parties to, or complying with, the terms of the MEA.

Intellectual Property Rights in Living Things. Another topic that could have significant EH&S impacts (which the members previously agreed to address under the TRIPS Agreement as part of the "built-in agenda" for future negotiation) is whether to modify the TRIPS Agreement requirements to protect intellectual property rights (IPRs) in living organisms. Protecting IPRs in living things has been a divisive issue for a number of years. Developed country WTO members tend to favor enhancement of these rights, while developing country WTO members are more likely to prefer curtailment of these rights and increased protection of the rights of indigenous peoples and farmers.

Public Participation. A fifth topic promoted by the United States and other developed countries is enhancement of public participation in WTO activities. Currently, public access to WTO documents, including documents relating to disputes, is limited (though significantly improved from practice under the GATT) and often delayed for months after initial release to WTO members.[71] The public also has no right to participate in any WTO forum, including dispute settlement procedures. Dispute settlement panels can choose to seek the advice of experts and can accept amicus curiae briefs from NGOs, but only WTO members have a right to be heard.

Dispute Settlement. Sixth, some members have proposed modification of the WTO dispute settlement system, the features of which are also up for review under the DSU as part of the "built-in" agenda. Possible areas of adjustment include greater participation for civil society as noted above, and adjustment and clarification of procedural rules to enhance efficiency.

b. Other Events at the WTO

In addition to the Seattle Ministerial, the WTO membership addressed EH&S issues both in a High-Level Symposium on Trade and Environment, held March 15–16 in Geneva, and in the WTO's Committee on Trade and Environment (CTE), which held three meetings in 1999.

High-Level Symposium. Senior representatives from the trade, environment, and development ministries of WTO member countries attended the high-level symposium to exchange views with approximately 130 NGOs representing environmental, development, consumer, and industry interests. Many WTO members continue to want to limit nongovernmental entities' access to WTO meetings and participation in WTO activities. Nonetheless, the senior level of the WTO Member representatives who attended the high-level symposium acknowledged the need for the WTO membership to discuss directly with various interest groups issues of concern to them.

Committee on Trade and Environment. CTE met three times to consider the various EH&S topics that it was tasked to evaluate in the Ministerial Decision on Trade and Environment adopted in the Uruguay Round of negotiations, which established the WTO. Many of these topics parallel issues that members proposed to address in the next trade

71. *See* Weiner & Van Dyke, *A Handbook for Obtaining Documents from the World Trade Organization* (1996).

round.[72] Of particular note, the CTE invited representatives of the secretariats for five MEAs to an information session during its second meeting of the year held in June. Representatives of the secretariats made presentations and provided papers to inform the WTO members of trade-related developments under these agreements.

The CTE's annual report for 1999 provides a tentative schedule for CTE meetings in 2000, at which the membership will continue to consider the EH&S-related issues with which it has been tasked. It does not appear likely that the CTE will generate any recommendations relating to these issues in the near-term. The United States has, however, proposed that the CTE serve as a forum to assess the environmental impacts of proposals considered in the next trade round. If agreed upon, this new mandate might increase the significance of the CTE as a source of guidance to the WTO membership on how to address EH&S issues.

c. Dispute Settlement Update

Activity relating to implementation of two existing EH&S dispute settlement decisions is worthy of note as an indicator of the current ability of the WTO to address these sometimes politically charged issues. In addition, an Appellate Body decision was released that is significant for the additional guidance it provides concerning the rights and obligations established under one of the most important WTO agreements from an EH&S perspective, the SPS Agreement.

Beef Hormone & Shrimp/Turtle. Generally, when a WTO member is found to have violated a WTO agreement, it must make appropriate adjustments to its domestic law within a reasonable period of time, typically from several months to over one year. The period for implementation of two significant dispute settlement decisions, *European Communities – Measures Affecting Meat and Meat Products (Beef Hormones)* and *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp/Turtle)*, expired in 1999.

The *Beef Hormones* case concerned a ban imposed by the European Union on imports of beef treated with certain hormones alleged to pose a health risk, which was found to be inconsistent with the SPS Agreement. The implementation period for the ruling in this case expired in May 1999. The European Union was unable to implement the ruling within the period. The United States and Canada requested authorization to suspend in retaliation

72. Specifically, the decision calls upon the Committee to consider, and to decide whether to make any recommendations to alter WTO agreements in light of:

- the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to MEAs;
- the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
- the relationship between the provisions of the multilateral trading system and:
  (a) charges and taxes for environmental purposes;
  (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling, and recycling;
- the provisions of the multilateral trading system with respect to the transparency of trade;
- measures used for environmental purposes and environmental measures and requirements that have significant trade effects;
- the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
- the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions; and
- the issue of exports of domestically prohibited goods.

concessions granted to the European Union, and the European Union filed for arbitration regarding the level of suspensions requested. The panel found that the United States had suffered nullification equal to U.S.$116.8 million of its benefits under the WTO agreements and that Canada had suffered nullification of Cdn.$11.3 million of its benefits. In July, the Dispute Settlement Body (DSB) authorized the United States and Canada to suspend concessions granted to the European Union by these respective amounts.

The *Shrimp/Turtle* case addressed a ban imposed by the United States on imports of shrimp caught in certain countries that did not require the use of a turtle-extruding device to protect endangered turtles, which was found to be inconsistent with the GATT. The implementation period for this ruling expired in December 1999. The United States announced in January 2000 that it had implemented the DSB rulings and recommendations.

Both of these cases involved EH&S measures of concern to the public in the member countries against whom the challenges were brought. The European Union did not adjust its laws, perhaps because of internal political pressures, but the United States and Canada were able to impose retaliatory measures to compensate for their financial losses. The United States has changed its regime for the moment, despite pressure from members of the environmental community. If it had been unable to do so, India, Malaysia, Pakistan, and Thailand could have imposed retaliatory sanctions. While these outcomes may not reflect achievement of optimal results, they do seem to reflect a system that remains capable of addressing politically volatile EH&S issues in a manner that WTO members find tolerable.

Japan Apples. The year also saw one new dispute settlement decision relating to EH&S issues worthy of note as one in a series of cases concerning alleged violations of the SPS Agreement. The United States filed a complaint against Japan in April 1997, *Japan – Measures Affecting Agricultural Products*, claiming that Japan had violated the SPS Agreement, the GATT, and the Agreement on Agriculture, by imposing quarantine measures prohibiting the importation of separate varieties of fruits subject to a quarantine requirement until the quarantine treatment had been tested for that particular variety, even if the quarantine treatment had already been found effective for another variety of the same fruit. On February 22, 1999, the WTO Appellate Body upheld an October 1998 panel decision finding Japan had violated the SPS Agreement. Japan has abolished the varietal testing regime and, as of this writing, is working with the United States to develop a mutually satisfactory alternative.

The Appellate Body made several rulings of interest from an EH&S perspective, including the following three interpreting important provisions of the Agreement. The Appellate Body ruled that there is a scientific justification for a measure, for purposes of article 3.3, if there is a rational relationship between the SPS measure and available scientific information. On this basis, the Appellate Body held that under article 2.2, there must be an objective rational relationship between the SPS measure at issue and the available scientific information, and that this determination must be made on a case-by-case basis, taking into account the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence. Applying this standard, the Appellate Body next found that no such rational relationship existed in this case. Lastly, the Appellate Body found that Japan had violated article 5.7 by failing to seek additional information necessary for a more objective risk assessment within a "reasonable period of time," as required when imposing interim SPS measures taken in the face of inadequate, available scientific evidence of risk. In arriving at this determination, the Appellate Body

similarly ruled that such determinations must be made on a case-by-case basis, and must depend on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review and the characteristics of the provisional SPS measure.

d. Events Outside the WTO

As discussed elsewhere in this article, how to balance rights and obligations established in MEAs to achieve environmental goals against rights and obligations established in WTO agreements to promote freer and fairer trade, remains a highly-charged, divisive issue. How to strike this balance was a central topic of debate and negotiation for governments participating in the negotiations for the Cartagena Protocol on Biosafety, adopted in January 1999. Similar concerns will continue to be an important issue to governments attempting to conclude a multilateral agreement on production, use, release, and trade in POPs.

Public reaction to challenges brought under NAFTA chapter 11 to environmental regulations continue to reflect concerns over the ability of the WTO, as well as NAFTA, to impact environmental regimes. Most dramatically, public protests outside the WTO Ministerial, held in Seattle, in part manifested perceptions and fears that WTO rules may negatively affect national and international environmental regimes.

2. *Preview of 2000*

It appears that the next round of WTO trade negotiations may begin towards the end of 2000, though this remains uncertain. In any event, trade-related EH&S issues can be expected to be addressed in the CTE, as well as other WTO bodies, including the SPS, TBT, and TRIPS Committees. The CTE also plans to hold a series of regional seminars on trade-related EH&S issues for developing country government officials, and to hold two additional MEA information sessions.

A number of EH&S-related disputes may be settled in 2000, mostly regarding SPS measures. One dispute, *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products*, is of particular note, as it may be the first to interpret the TBT Agreement. This challenge brought by Canada concerns measures imposed by France to prohibit asbestos and asbestos products, including a ban on their imports. Canada has alleged violations of both the SPS and TBT Agreements.

IV. Special Focus on International Agreements Concerning Marine Resources and the Marine Environment

The United Nations Convention on the Law of the Sea (UNCLOS), with Annexes, completed on December 10, 1982, and the Agreement Relating to the Implementation of Part XI of UNCLOS, adopted and opened for signature at the United Nations on July 28, 1994 (Part XI Agreement), establish the legal regime governing activities on, over, or under the world's oceans. UNCLOS entered into force on November 16, 1994 (and the Part XI Agreement on July 28, 1996). As of March 8, 2000, 132 states had ratified UNCLOS and ninety-six states had ratified the Part XI Agreement. The U.S. Senate has not yet provided its advice and consent on either instrument.

UNCLOS contains framework provisions governing protection of the marine environment as well as management and conservation of marine resources in areas within national jurisdiction and on the high seas. UNCLOS also establishes a dispute settlement body, the International Tribunal of the Law of the Sea, and names a number of other fora for settlement of disputes arising under the treaty, including the International Court of Justice.

The year 1999 saw a number of developments in the areas of living marine resource conservation as well as prevention of marine pollution.

A. Management of Living Marine Resources

1. *U.N. Treaty on Straddling Stocks and Highly Migratory Fish Stocks*

The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Straddling Stocks Agreement), was adopted on August 4, 1995, but as of March 8, 2000, had only twenty-six of the thirty ratifications or accessions required for entry into force. The United States has ratified this agreement; the most recent ratifications were by Uruguay in September 1999 and Australia in December 1999.

In 1999, the United States continued negotiations on the first regional agreement on the conservation of highly migratory species to be undertaken pursuant to this agreement. The Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific (MHLC) began taking shape in 1994 under the leadership of the South Pacific Forum Fisheries Agency.[73] While negotiations have focused on management of tuna stocks, the MHLC is ultimately intended to govern the conservation and management of all highly migratory fish stocks occurring within the identified UNCLOS area.

In 1999, two MHLC negotiating sessions in Honolulu, Hawaii produced a draft convention text governing the following: functions of the management commission (including establishment of a TAC and regional observer program within the convention area); provision of scientific advice and review thereof; the relationship with fishery organizations managing nearby waters; the definition of western and northern boundaries of the convention area; provision for a subcommittee on the stocks occurring in the northern part of the convention area; transshipment practices; provisions for international standards concerning precautionary approaches; voting procedures; and provisions to allow participation by nonmembers. The MHLC will meet again in Honolulu in April 2000, and is scheduled to conclude in August 2000 in Fiji. Adoption of a draft convention is expected in 2000.

2. *FAO Initiatives*

Formed in 1945, the Fisheries and Agriculture Organization (FAO) of the United Nations, an agency based in Rome, Italy, is charged with raising nutrition levels and standards of living, improving agricultural productivity, and bettering the condition of rural communities. One of the FAO's specific priorities is developing a long-term strategy for the conservation and management of natural resources, including fisheries. The Committee on Fisheries (COFI) is a subsidiary body of the FAO, and is the only global inter-governmental forum for the examination of major international fisheries issues; COFI has served as a forum for negotiation of global agreements and non-binding instruments. Two agreements adopted by the FAO include the Agreement to Promote Compliance with Interna-

73. Participants include Australia, Canada, China, Cook Islands, Federated States of Micronesia, Fiji, France, French Polynesia, Indonesia, Japan, Kiribati, Marshall Islands, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Republic of Korea, Samoa, Solomon Islands, Chinese Taipei, Tonga, Tuvalu, United States, Vanuatu, and Wallis and Futuna.

tional Conservation and Management Measures by Fishing Vessels on the High Seas (the Compliance Agreement), based on article 91 of UNCLOS, adopted by consensus of the FAO Conference on November 24, 1993, and the Code of Conduct for Responsible Fisheries, adopted on October 25, 1995.

In 1999, under U.S. leadership, COFI adopted three International Plans of Action (IPOA) relating to fisheries conservation. First, it adopted an IPOA for the Management of Fishing Capacity, implementation of which has been assigned high priority by the FAO. Under this plan, states are urged to assess capacity, prepare national plans to effectively manage fishing capacity, take immediate action for coastal fisheries or transboundary stocks requiring urgent measures, and strengthen regional fisheries organizations to improve management of capacity. The FAO is preparing technical guidelines for the management of fishing capacity to assist nations in implementing the IPOA. Second, an IPOA for the Conservation and Management of Sharks was adopted, which sets forth strategies to ensure the sustainable use and biodiversity of sharks through precautionary approaches to preventing over-fishing and reducing waste (e.g., finning), increase data available on shark stocks and fisheries, and develop global and regional management approaches. Finally, COFI adopted an IPOA for the Reduction of Seabird By-catch in Longline Fisheries.

In 2000, the United States is planning to develop another FAO Plan of Action on illegal, unregulated, and unreported (IUU) fishing, and press for additional measures to address IUU fishing through existing regional agreements (e.g., ICCAT). The FAO expects to prepare a draft IPOA on IUU fishing at its meeting in Rome in October 2000. In addition, the FAO has established a Task Force on Fishery Subsidies to address fisheries trade issues. The Task Force is directed to assess the impact of subsidies on fishery resources, sustainability of harvest, and subsequently, on international trade in fish and fish products. Similarly, pursuant to language in the 1996 amendments to the Magnuson-Stevens Fishery Conservation and Management Act, in July 1999, a Federal Fisheries Investment Task Force issued a report studying the role of the U.S. government in subsidizing the expansion and contraction of fishing capacity in the fleets operating in federally managed fisheries and otherwise influencing investments in these fisheries.

3. *International Tribunal for the Law of the Sea: Southern Bluefin Tuna Case*

In 1999, the International Tribunal for the Law of the Sea considered and ruled on its first fishery conservation and management dispute. The case involved a disagreement among Australia, New Zealand, and Japan, all parties to the 1993 Convention for the Conservation of Southern Bluefin Tuna. Since 1995, Japan has sought an increase in the total allowable catch (TAC) of Southern Bluefin Tuna, but the commission has not permitted any increase. Beginning in 1998, Japan unilaterally began an experimental fishery, which Australia and New Zealand alleged was undertaken essentially for commercial purposes. The complainants submitted the dispute to an arbitration procedure under Annex VII of UNCLOS, but in July 1999, pending the creation of the arbitral tribunal, they filed this request for provisional measures (an interim injunction against the experimental fishery) from the International Tribunal pursuant to UNCLOS section 2, part XV. Australia and New Zealand argued that Japan's experimental fishery constituted a failure to conserve and to cooperate in the conservation of the Southern Bluefin Tuna stock because it threatens serious or irreversible damage to the population. The Tribunal heard arguments in five sessions held in August 1999.

On August 27, 1999, the Tribunal issued its decision. The provisional measures ordered by the Tribunal were as follows. First, the parties were ordered to prevent taking actions

that might aggravate or extend the disputes submitted to the arbitral tribunal. Second, the parties were ordered not to take any action that might prejudice the implementation of any decision on the merits that the arbitral tribunal may take. Third, the Tribunal ordered that the parties restrict their annual catches to the annual national allocations (and count the experimental fishing catches against those allocations). Fourth, the Tribunal ruled that no experimental fishing program could be conducted unless agreed to among the parties, or unless the catch is counted against the national allocation. Finally, the Tribunal decided that the parties should immediately resume negotiations and make further efforts to reach agreement with other states and fishing entities engaged in fishing for Southern Bluefin Tuna to ensure conservation and promote optimum utilization of the stock. A report from the parties on their planned compliance with the order was due on October 6, 1999. The arbitral tribunal will convene in Washington, D.C. in April or May of 2000, with a panel of five international arbitrators.

B. Recent Developments Under Other International or Regional Agreements Concerning Management of Living Marine Resources

1. *The International Commission for the Conservation of Atlantic Tunas*

The International Commission for the Conservation of Atlantic Tunas (ICCAT) has management authority over highly migratory fish species including swordfish, tunas, billfishes, and sharks throughout their ranges in the Atlantic Ocean and adjacent seas. At its 1999 meeting, ICCAT extended time/area closures for bigeye, yellowfin, and skipjack tunas in the Gulf of Guinea, and directed the Standing Committee on Research and Statistics (SCRS) to evaluate the fishing capacity of different fleets and gears in the northern albacore tuna fishery. ICCAT's most significant accomplishment at its 1999 meeting was adoption of a ten-year rebuilding plan for North Atlantic swordfish. The swordfish agreement establishes three years of progressively smaller TACs, inclusive of undersized fish that are discarded dead (dead discards). The United States and Canada are the only countries that report dead discards and, thus, the allowance for such discards is divided between these two countries (eighty percent for the United States, twenty percent for Canada). In addition, ICCAT adopted a measure urging countries to analyze the possibility of time and area closures as measures to conserve juvenile swordfish.

ICCAT moved to continue nondiscriminatory trade measures on bluefin tuna and swordfish products from Belize and Honduras, neither of which had submitted to ICCAT the requested information on tuna fishing activities. For the first time, ICCAT took trade restrictive measures on bluefin tuna products against a member country, Equatorial Guinea.

Pursuant to a resolution adopted in 1998 designed to help address the problems associated with IUU catch of tuna by large-scale longline vessels, ICCAT identified Belize, Cambodia, Honduras, Kenya, the Philippines, Sierra Leone, Singapore, and St. Vincent and the Grenadines as potentially undermining tuna conservation measures, and requested that each country take steps to ensure that their fleets cease fishing in such a manner. Three contracting parties (Equatorial Guinea, Republic of Guinea, and Trinidad and Tobago) were identified as nations whose large-scale longline vessel operations may undermine the effectiveness of ICCAT, and the commission will consider whether trade restrictive measures are appropriate at next year's meeting. ICCAT also adopted a resolution endorsing the FAO initiative to develop an IPOA of IUU fishing and encouraging ICCAT members to ratify the Straddling Stocks Agreement.

2. *North Atlantic Salmon Conservation Organization*

The Convention for the Conservation of Salmon in the North Atlantic Ocean, the basic instrument for the North Atlantic Salmon Conservation Organization (NASCO), applies to migratory salmon stocks north of thirty-six degrees latitude. Member nations include Canada, Denmark, the European Communities, Iceland, Norway, the United States, and the Russian Federation. NASCO's task is to promote both the collection and dissemination of scientific data on North Atlantic salmon stocks and the conservation, restoration, and sound management of such stocks.

At its 1999 meeting, NASCO expressed recurrent concern over high levels of unreported catch. Consequently, the organization moved to refine its processes to better address this unreported catch. In addition, NASCO adopted the Action Plan for the Application of the Precautionary Approach to Salmon Management, and established a standing committee to oversee this work. This standing committee is tasked with considering a broad array of issues including habitat concerns, by-catch, stock-rebuilding scenarios, and aquaculture issues, including the possibility of genetic modification of wild stocks. NASCO recognized the need to involve the salmon farming industry in efforts to conserve wild stocks and established a Liaison Group to work with the International Salmon Farmer's Association. The third Liaison Group meeting with all aquaculture industries in the North Atlantic convened in February 2000, to consider guidelines on physical containment and salmon husbandry practices.

Scientific evidence presented in 1999 suggests that Atlantic salmon abundance is at the lowest level ever recorded since 1993. The United States has no commercial Atlantic salmon fishery. As of December 1999, Maine closed its catch and release fishery, and the National Marine Fisheries Service and Fish and Wildlife Service are proposing to place a distinct population segment of Atlantic salmon in the Gulf of Maine on the list of endangered species under the Endangered Species Act.

3. *Inter-American Convention for the Protection and Conservation of Sea Turtles and Shrimp-Turtle Issues*

The Inter-American Convention for the Protection and Conservation of Sea Turtles requires four more ratifications before it enters into force. At the 20th Sea Turtle Symposium on March 3, 2000, the membership passed a resolution urging countries to complete their ratification processes; the convention will likely receive the remaining ratifications necessary to enter into force in the near future.

Since the mid 1990s, there has been much controversy surrounding section 609 of U.S. Public Law 101–162, which prohibits the importation of shrimp harvested in ways that are harmful to species of sea turtles. In the WTO in 1996, Malaysia, Pakistan, Thailand, and India brought a suit claiming that U.S. implementation of an embargo on their shrimp products violated U.S. obligations under the WTO agreement. A panel ruled against the United States on many counts, and the United States appealed to the WTO Appellate Body. The Appellate Body ruled on October 12, 1998 that, while section 609 itself was not inconsistent with U.S. obligations under the WTO agreement, U.S. implementation of section 609 was inconsistent with the agreement.

During 1999, the United States began taking steps in response to this decision. The United States will: (1) evaluate comparability of sea turtle protection programs with greater flexibility, transparency, and predictability; (2) provide more thorough technical training in the proper use of turtle excluder devices (TEDs); (3) now allow importation of shrimp

products from fishermen who use TEDs in nations that remain uncertified (i.e., certification on a fishery-specific basis); and (4) seek to negotiate a multilateral agreement among shrimp fishing nations in the Indian Ocean.

4. *The International Whaling Commission*

The International Whaling Commission (IWC) met in Grenada in May 1999, and adopted several important resolutions. The IWC adopted a resolution urging governments to take immediate action and to prevent takes of certain species of bowhead, northern right whales, and blue whales, which remain in grave danger. Scientific whaling permits were also discussed at this year's meeting; the IWC adopted a resolution calling on the government of Japan to refrain from issuing scientific whaling permits and reiterated that in reviewing scientific permits, the Scientific Committee should examine whether the research is required for management or could be carried out using non-lethal means. Finally, the IWC adopted a resolution to begin evaluations aimed at reducing time to unconsciousness and death of animals hunted in aboriginal subsistence fisheries.

The IWC refused Japan's proposal to provide interim relief from the existing ban on commercial whaling and allow the take of fifty minke whales. Norway also lodged objections to the ban on the taking of minke whales, and has exercised its right to set national catch limits for this species.

5. *Inter-American Tropical Tuna Commission & Panama Declaration*

The Inter-American Tropical Tuna Commission (IATTC) established an international dolphin conservation program (IDCP) in 1990 under which they sought to reduce dolphin mortality due to the encirclement method of fishing (setting on dolphins). In 1995, the Panama Declaration reaffirmed the commitments and objectives of the IDCP and announced that participating governments should formalize it as a binding legal instrument. On February 15, 1999, the agreement entered into force with ratifications by the United States, Panama, Ecuador, El Salvador, Venezuela, Nicaragua, Costa Rica, Honduras, and Mexico. As a result, key provisions of U.S. companion legislation, the International Dolphin Conservation Act, were implemented, allowing imports of yellowfin tuna into the United States from nations that comply with the IDCP. Under the IDCP legislation and implementing regulations, tuna caught by encirclement of dolphins can be imported and labeled as "dolphin safe," provided no dolphins were killed or seriously injured during the fishing set.

6. *The Commission for the Conservation of Antarctic Marine Living Resources*

The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) was established under the 1982 Convention for the Conservation of Antarctic Marine Living Resources, which aims to ensure the conservation of the Antarctic marine ecosystem. In 1999, the CCAMLR adopted further fishery conservation measures that include: restrictions on allowable gear types, overall catches, and bycatch of certain species of fish, krill, squid, and crabs; limitations on participation in certain new fisheries; and the requirement that all contracting party vessels fishing in the Convention area have a Vessel Monitoring System (VMS). CCAMLR continued discussions on trade measures and adopted a catch certification scheme for threatened toothfish (Chilean sea bass). Toothfish landed in ports of CCAMLR parties, transshipped to their vessels or through their ports, or imported into their territories must be fully documented.

7. *Pacific Salmon Treaty*

The Pacific Salmon Treaty of 1985 required the United States and Canada to develop periodic bilateral agreements to implement the treaty's conservation and harvest-sharing principles. Long-standing disputes prevented such agreements from being adopted until June 30, 1999, when the United States and Canada finally adopted Annexes to the Treaty providing for the following: (1) establishment of abundance-based fishing regimes; (2) the creation of two bilateral regional funds for improving fishery management and enhancement; and (3) improved bilateral coordination and scientific information.

8. *U.S.-Russian Maritime Boundary Agreement*

On September 16, 1991, the U.S. Senate gave its advice and consent to ratification of the U.S.-Soviet Maritime Boundary Agreement in an attempt to resolve a long-standing controversy over-fishing and mineral rights. While the Russian government has implemented many terms of the agreement, they have never formally ratified it, largely due to concerns surrounding the equitability of its provisions. Conflict around this U.S.-Russian maritime boundary escalated during the Bering Sea fishing season of 1999. The U.S. Coast Guard reportedly detected ninety-two illegal foreign fishing vessel incursions into U.S. waters, the highest number ever recorded and a ten-fold increase from 1998. Most cases were not prosecuted due to the brevity of the incursions or the inability to apprehend the criminal vessels. However, several cases were transferred to Russian authorities for action in an attempt to dissuade further tension between the United States and Russia.

C. Management of Marine Pollution

UNCLOS article 194 requires States to take measures to address sources of marine pollution from land-based sources, vessels, and other instruments or devices operating in the marine environment. With respect to land-based sources, States are required to adopt laws and regulations to prevent, reduce, and control such pollution, taking into account internationally agreed rules, standards, and recommended practices and procedures. Vessel pollution must be addressed not only by flag States, but also by coastal and port States. Regulations governing vessel pollution must be in accordance with generally accepted international standards, specifically under the International Maritime Organization (IMO) of the United Nations.

IMO, established under a 1948 U.N. Convention, has adopted thirty-seven conventions and protocols, including the Convention on the Prevention of Pollution from Ships (MARPOL), the International Convention on Oil Pollution Preparedness, Response, and Cooperation, and the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea. The State Department has delegated a large part of IMO responsibility to the Coast Guard.

MARPOL has five annexes (I-V). Only annexes I and II (dealing respectively with pollution by oil and by noxious liquid substances) are mandatory. All others are optional. Annex IV, which deals with sewage discharge, has not yet entered into force. Under annex IV, adopted in 1983, ships would not be permitted to discharge sewage within four miles of the nearest land, unless they are using an approved treatment plant. Between four and twelve miles from land, sewage would have to be disinfected before discharge. The IMO secretariat circulated a revised text of annex IV and, in December 1999, the United States submitted amendments necessary to make the annex suitable for ratification by the United States and,

therefore, more likely to enter into force. Many of these changes reflect adjustments needed to address changes in technology and policy over the last sixteen years. These include changing the definition of "sewage" to clarify appropriate treatments for "black water," "gray water," and infectious and medial waste. In addition, the United States recommended that a revised annex IV update and revise effluent standards to take into account considerations beyond distance from land in setting discharge limitations. These would include proximity to sensitive habitats such as coral reefs.

In addition, in 1999 the IMO formally recognized the need to fill an existing gap in the international regime governing liability and compensation for oil pollution, which currently does not cover oil spills from non-tank vessels. Bunker fuel spills from non-tank vessels pose a substantial threat to the marine environment. While U.S. domestic law (Oil Pollution Act of 1990) addresses these types of spills, there is no such parallel in international law. In October 1999, the IMO Legal Committee voted to submit a Draft Convention on Civil Liability for Bunker Oil Pollution Damage to a diplomatic conference to be held in 2000–2001.